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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941.

W. A. NAILLING,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

No. 1042

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

L. E. GWINN,
Counsel for Petitioner,
W. A. Nailling.

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No.....

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Dr. W. A. Nailling, petitioner herein was convicted on Counts X to XVII of an indictment in seventeen counts which charged sales of morphine sulphate in violation of Section 2554 of the Internal Revenue Code (U. S. C., Title 26), and acquitted on the others. He was sentenced to pay a fine of $1250 and to serve five years in a federal prison under each of the eight counts

on which he was convicted, the prison sentences to run concurrently. (R. 32, 33.)

The Circuit Court of Appeals for the Sixth Circuit affirmed the judgment by an order which recites that no motion for a directed verdict was made but that the court had examined the record to determine whether there had been a miscarriage of justice and was satisfied that the evidence was sufficient to support the verdict. No other question was discussed in that order.

A petition to rehear was filed by counsel, employed after the affirmance of the judgment. That petition was answered by the Government, considered by the court, and denied in a written opinion, not yet officially published, but incorporated in the record and set out in the brief.

The action of the court on the issues first raised by the petition for a rehearing is the basis of this application for a writ of certiorari, and it has been incorporated in the record as a part of the proceedings in the Circuit Court of Appeals.

The jurisdiction of this court is invoked under Section 240 of the Judicial Code, as amended, and within the time allowed therefor by Rule XI of the Rules of Practice and Procedure promulgated by this Court May 7, 1934.

Except as to dates, the counts on which petitioner was convicted were uniform, each charging the sale by petitioner of approximately five grains of sulphate morphine (R. 16-24) by "means of a purported prescription" on the date therein stated "for Harry Dezonia,

calling for the amount of morphine sulphate'' set out in the count (R. 16-24). The dates of the several prescriptions, as alleged in the counts on which petitioner was convicted, were June 1, 3, 4, 5, 6, 7, 8 and 9, respectively (R. 16-24).

Each of these counts charged a sale that was not made in pursuance of a written order on a form issued by the *''Commissioner of Internal Revenue.''*

Section 2554 of the Internal Revenue Code only prohibits sales that are not made on order forms issued by the ''Secretary'' of the Treasury.

Conceiving that the offense created by Section 2554 of the Internal Revenue Code is, as defined by this Court (Nigro vs. U. S., 276 U. S. 332, 345), a sale that is not made on a *''particular form of order,''* both the ''registered and unregistered seller'' being ''punished for not using the order forms as the statutes requires, or for misusing them,'' the petition to rehear pointed out that the indictment did not state an offense under the statute.

The Circuit Court of Appeals did not question the contention that the indictment did not state an offense under the statute as written, but holding that Treasury Regulations, made pursuant to statutory authority, had delegated the powers and duties of the Secretary of the Treasury with respect to order forms to the Commissioner of Internal Revenue, it sustained the indictment on the ground that it stated an offense under the *statute as modified by the regulations.*

But that conclusion, and irrespective of the constitutionality of any statute that delegates to an administrative official the power to change the terms of a statute, creating and defining a criminal offense, rests upon a false premise. The regulations, to which more specific reference is hereinafter made, confer upon the Commissioner of Narcotics, and not upon the Commissioner of Internal Revenue, all powers and duties with respect to order forms therein delegated.

The prosecuting attorney in alleging a sale that was not made in pursuance of an order form issued by the "Commissioner of Internal Revenue" followed a stereotyped form of indictment under the original statute which provided that the order forms should be issued by the Commissioner of Internal Revenue, and prosecutors generally have continued to use that form in drawing indictments under the amended statute which requires the order forms to be issued by the Secretary of the Treasury.

In that situation, the general importance of the question under consideration—one that may affect the validity of many pending and future indictments—is too obvious to require special emphasis.

The petition for a rehearing also pointed out that the conviction of petitioner herein rested upon an arbitrary and unconstitutional application of Section 2554 and exceptions thereto, applicable to physicians.

These counts involved prescriptions issued by petitioner to Harry Dezonia, an addict temporarily working in Union City, Tennessee, where petitioner owned

and operated a hospital, eight prescriptions being issued during a period of ten days, none exceeding Dezonia's reasonable requirement for a twenty-four-hour period for relief from the intense pain he was suffering. The addict, told by petitioner that he would only treat him for a limited period, and advised to enter a narcotic institution for treatment, informed petitioner that he had made arrangements to do so as soon as he completed his temporary work in Union City, confirming that statement by a letter from such an institution at Lexington, Kentucky (R. 113, 162, 163, 198, 200).

The precise questions involved in the contention that the statute was given an arbitrary and unconstitutional application, undisputed facts that are pertinent to a consideration thereof, and matters relevant in determining whether the indictment states an offense, will now be more specifically stated and shown.

Statute Involved.

The statute, which petitioner is alleged to have violated, reads as follows:

> "(a) *General requirement.* It shall be unlawful for any person to barter, exchange, or give away any of the drugs mentioned in section 2550 (a) except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the *Secretary.*" (Italics ours.)

One of the exceptions to that Section, deemed relevant (Subsection (c), Paragraph I) to issues raised by this petition, is as follows:

> "Nothing contained in this section (2554), section 2563, or section 2564 shall apply—

(1) *Use of drugs in professional practice.* To the dispensing or distribution of any of the drugs mentioned in section 2550 (a) to a patient by a physician, dentist, or veterinary surgeon registered under section 3221 in the course of his professional practice only: *Provided,* That such physician, dentist, or veterinary surgeon shall keep a record of all such drugs dispensed or distributed, showing the amount dispensed or distributed, the date, and the name and address of the patient to whom such drugs are dispensed or distributed, except such as may be dispensed or distributed to a patient upon whom such physician, dentist, or veterinary surgeon shall personally attend; and such record shall be kept for a period of two years from the date of dispensing or distributing such drugs, subject to inspection, as provided in section 2556."

The Indictment.

Omitting formal parts, count XVII, uniform with the others as to form and essential averments, reads as follows :

"That the defendant, W. A. Nailling, on or about the 9th day of June, 1940, at Union City, Obion County, Tennessee, and within the aforesaid division and district, within the jurisdiction of this Court, and who was then and there a physician dispenser in opium, morphine, cocaine, and other narcotic drugs specified in an Act of Congress of December 17, 1914, and amendments thereto, did unlawfully, knowingly, wilfully and feloniously sell, barter, exchange, dispense and give away approximately five (5) grains of morphine sulphate, a derivative of opium, the said selling, bartering, exchanging, dispensing and giving away of the aforesaid morphine sulphate not being in pursuance of a written order of the person to whom the said morphine sulphate

was bartered, sold, exchanged, dispensed, and given away, *on a form issued in blank for that purpose by the Commissioner of Internal Revenue of the United States,* and was not dispensed, sold, bartered, exchanged, distributed and given away by the said defendant in the course of his professional practice only, nor in good faith, the said sale, dispensing, exchange, bartering and giving away aforesaid being accomplished by means of a purported prescription dated June 9, 1940, for Harry Dezonia, calling for the amount of morphine sulphate set out above."

Indictment Fatally Defective.

The petition for a rehearing challenged the validity of the above count and others of like tenor and substance, on the following grounds:

(1) It does not designate the purchaser.

(2) It does not charge that the prescription, alleged to be the means through which the sale was made, was issued by petitioner.

(3) The indictment charges that the sale was not made in pursuance of a written order on a form issued by the "Commissioner of Internal Revenue of the United States," and Section 2554 (a) requires that the order be written on a "*form to be issued by the Secretary*" (of the Treasury).

The rejection by the Circuit Court of Appeals of the third contention stated squarely raises the issue presented by the first question in this petition, to-wit:

(1) Whether Section 2554 of the Internal Revenue Code, creating and defining the offense for which peti-

tioner was convicted, has been or lawfully could, be so modified by Treasury regulations as to validate an indictment that does not state an offense under the statute as written.

In denying the petition to rehear, which challenged the sufficiency of the indictment, the Circuit Court of Appeals said:

> "And it appearing that while the indictment charges that the sale of morphine sulphate was not made in pursuance of a written order on a form issued by the Commissioner of Internal Revenue, and Section 2554 (a) requires that the order be written on 'a form to be issued' by the Secretary of the Treasury, the Secretary is authorized by statute to delegate and has delegated authority to the Commissioner of Internal Revenue to issue such order forms. Act of March 3, 1927 (44 Stat. 1381, Sections 4 (a) and 4 (b); Treas. Dec. No. 3999, issued March 18, 1927; Treas. Dec. No. 1 (Bureau of Prohibition), issued April 1, 1927; Act of June 14, 1930 (46 Stat. 585, Section 3 (b); Treas. Dec. No. 2 (Bureau of Narcotics), issued July 1, 1930; Section 2606, Title 26, I. R. C.; Treas. Dec. No. 4884, issued February 11, 1939."

With respect to the above holding, it is the contention of petitioner that Treasury Decision No. 2 (Bureau of Narcotics), issued July 1, 1930, and kept in force by Treasury Decision No. 4884, issued Feb. 11, 1939, delegates no authority whatever with respect to order forms to the Commissioner of Internal Revenue, but vests all authority therein delegated with respect to such forms in the Commissioner of Narcotics (Treas. Dec. No. 2, Sec. 3, subsection 1-a; Sec. IV); that the delegation of such authority to the Commissioner of Narcotics, and not to the

Commissioner of Internal Revenue, is required by the applicable statutes (I. C. R., Sec. 2606; U. S. Code, Title 5, Sec. 281-c, subsection a; U. S. Code, Title 5, Sec. 282-b, subsection a); and that any delegated authority, if the statutes confer such, that authorizes an administrative official to modify in an essential feature a statute that creates a criminal offense, would be an unconstitutional delegation of legislative power.

Sections 3, 4 and 5, these being the pertinent provisions of Treasury Decision No. 2, issued July 1, 1930, and the applicable statutes are set out in full in the accompanying brief.

Conviction of Petitioner Rests Upon an Arbitrary and Unconstitutional Application of the Statute.

The second question presented by this petition follows:

(2) Whether or not it is a violation of the federal statute for a physician, consulted by an habitual user of narcotics who is suffering intense pain, to prescribe narcotics for the relief of such suffering, whether caused by addiction alone or that and some other disease, when the quantity prescribed is not in excess of the reasonable requirements of the addict for a period of twenty-four hours and there is no probability that any part thereof will be used, and in point of fact none was used, by any person other than the addict.

Pertinent to the foregoing question is the testimony of a druggist that he was advised by a federal narcotic agent, also a witness in this case, that the federal law prohibited druggists from filling prescriptions, issued by a physician to addicts (R. 216), and that of Dr. Mc-

Laurin, *one of the expert witnesses for the Government who testified that "if a man came into his office very nervous from which he might die, and the witness knew he was an addict, he would not give him morphine," this being based on the understanding of that witness that administering morphine to or prescribing it for an addict was a violation of the federal statutes* (R. 134).

If we correctly construe the undisputed testimony, relating to the prescriptions issued Dezonia by petitioner, the judgment of conviction can only be sustained by adopting or acquiescing in the foregoing construction of the statute—a construction, as we conceive it, that is not only contrary to the uniform interpretation of the statute by this court but one that would render the statute unconstitutional as an attempt to regulate the practice of medicine with respect to the treatment of addicts.

The Circuit Court of Appeals did not, other than as may be implied from its affirmance of the judgment, indicate its view as to the proper construction and application of Section 2554 of the Internal Revenue Code, and exceptions thereto, relating to physicians.

We shall now briefly recite the undisputed facts that are deemed material in the consideration of the foregoing question and others hereinafter stated.

Material Facts.

It appears from the undisputed evidence:

That petitioner, 69 years of age, was a highly trained physician and surgeon (R. 148-149, 205); that he had owned and operated a hospital at Union City, Tennessee, from 1912 to the date of his trial; that during that period his practice had been extensive, including thousands of

operations, and successful (R. 46, 52, 88, 149); that he owned considerable real estate in and around Union City, which the Government attorney insisted had an assessed valuation of $250,000.00, and which petitioner was compelled to list over his protest during his cross-examination (R. 166-168); that narcotic prescriptions issued by him were not out of line with those issued by other doctors in the community (R. 45, 51, 59, 94, 115, 213, 217); and that he had a high personal and professional standing. (R. 200, 201, 221-231.)

The petitioner, consulted by Dezonia as a physician, prescribed narcotics for him for only a limited period of time (June 1-9, 1940), Dezonia being informed of such limitation; that petitioner advised him to go to a narcotic institution for treatment, which Dezonia agreed to do and submitted to petitioner a letter from such an institution in Lexington, Kentucky, showing that he had arranged to enter it when he completed his temporary work in Union City; that when each of the prescriptions was given to Dezonia he was suffering intense pain and the morphine sulphate was prescribed to relieve his suffering; that no prescription given Dezonia exceeded his reasonable requirements for a period of 24 hours; that there was no reasonable probability that any of the narcotics prescribed for Dezonia would be used by any other person, and none was so used; and that all prescriptions given were filled by a registered druggist and kept for inspection by narcotic officials (R. 113, 162, 163, 200, 245).

On one point, not important as we conceive the issues, there is a slight conflict between the testimony of De-

zonia and petitioner, this being the diseases other than addiction with which the addict was afflicted.

Dezonia, a government witness, testified there was nothing wrong with him "aside from the sinus trouble and drug habit" when he consulted appellant (R. 108); that when he came to petitioner's office on the occasions the prescriptions were issued he complained of intense pain (R. 115); that this "pain was felt in all parts of his body, which became very excruciating" (R. 113); that his sinus troubled him frequently and that it was "very severe" (R. 114, 115).

Petitioner testified that when he prescribed for Dezonia in June, 1940, the latter had enteritis and sciatica or neuritis; that he had pains in various parts of his body, "one day here and one day there"; that these pains were not solely the result of drug addiction (R. 198); that he gave the prescription to Dezonia "to control the pain and make him slightly useful" (R. 199).

The testimony as to Dezonia's condition when the prescriptions were given was restricted to his own testimony and that of petitioner.

Expert Testimony.

As to whether the course pursued by petitioner was "good practice" there was a conflict in the testimony of medical experts. Certain physicians, who testified for the Government, stated that they considered it bad practice to deliver morphine to an addict for self administration (R. 128, 143). Physicians, testifying for petitioner, stated that they considered it good practice to give to

an addict in the situation of Dezonia the quanties prescribed by petitioner (R. 235, 239, 240).

Two additional questions are presented by this application, and these we now state.

Third Question.

(3) Whether or not Section 2554 of the Internal Revenue Code can be so construed and applied as to punish a physician for prescribing a reasonable quantity of narcotics to a patient to relieve pain incident to addiction without rendering that Statute unconstitutional as a regulation of the practice of medicine in violation of the 10th Amendment to the Federal Constitution.

Fourth Question.

(4) Whether or not in the absence of any evidence of a generally accepted or recognized professional standard for the treatment of addicts, a finding that a prescription issued by a physician to an addict was not the course of his "professional practice only" may be predicated upon the conflicting opinions of medical experts as to what constitutes proper practice in such cases. Or, otherwise stated, may a finding of bad faith in prescribing drugs for an addict or the guilt or innocence of the accused be allowed to depend solely upon the choice a jury might make between the conflicting opinions of medical experts as to what constitutes the proper practice of medicine in cases where there is no evidence of a generally accepted or recognized professional standard?

REASONS WHY WRIT SHOULD BE GRANTED.

(1)

The offense created by Section 2554 of the Internal Revenue Code, as defined by this Court (Nigro vs. United States, 276 U. S. 332, 345, 351), is a sale that is not made on a "particular form of order" and both the "registered and unregistered seller" are "punished for not using the order forms as the statute requires, or for misusing them," and in sustaining the validity of an indictment that did not charge a sale that was not made on the particular form of order set forth in the statute, the Circuit Court of Appeals reached a conclusion that is in direct conflict with the applicable decision of this Court in Fleisher vs. United States, 302 U. S. 218-220.

(2)

In holding that Section 2554 of the Internal Revenue Code, creating and defining a criminal offense, could be modified in an essential thereof by Treasury Regulations, made pursuant to statutory authority, the Circuit Court of Appeals decided a question of general importance in the administration of criminal law in direct conflict with the applicable decision of the Circuit Court of Appeals for the 8th Circuit in St. Louis Merchants' Bridge T. Ry. Co. vs. United States, 188 Fed. 191-195, which, upon the authority of decisions of this Court therein cited, expressly holds that Congress cannot "*delegate its legislative power, its power to exercise the indispensible discretion, to make, to add to, to take from or to modify the law*".

The precise question decided by the Circuit Court of Appeals on the point under consideration had not thereto-

fore been expressly determined by this Court, a decision thereof being pretermitted in Swayne & Hoyt vs. United States, 300 U. S. 295-307, and Isbrandtsen-Moller Co. vs. United States of America, 300 U. S. 139-149, but the decision complained of seems to present a conflict with the principles pronounced by this Court in Panama Refining Company vs. Ryan, 293 U. S. 388-488, and Schechter vs. United States, 295 U. S. 495-555.

At any rate, the holding of the Circuit Court of Appeals with respect to the effect of the Treasury Regulations on Section 2554, presents a question of importance in the preparation of all indictments for violations of that statute, the importance thereof being emphasized by a consideration of the fact that the indictment in the instant case, alleging that the sale was not in pursuance of a written order on a form issued by the "Commissioner of Internal Revenue," followed the stereotyped form of narcotic indictments.

(3)

The Circuit Court of Appeals, in affirming the judgment and in denying the petition to rehear, necessarily construed the statute as either prohibiting a physician from prescribing for an addict at all or as regulating the quantity and the frequency of such prescriptions. In so applying the statute the Circuit Court of Appeals disregarded the construction thereof by this Court in Linder vs. United States, 268 U. S. 5, which holds that the statute does not attempt to prescribe methods for the treatment of addicts nor attempt to regulate the practice of medicine, and many other decisions of this Court which hold that the Act of December 17, 1914, commonly desig-

nated as the Harrison Narcotic Law, is a "registration and taxing Act" that does not prohibit a physician from prescribing narcotics for an addict for the "relief of suffering" incident to addiction nor attempt to prescribe methods for their medical treatment. United States vs. Jin Fuey Moy, 241 U. S. 394, 60 L. Ed. 1061; United States vs. Doremus, 249 U. S. 86, 63 L. Ed. 493; Webb vs. United States, 249 U. S. 96, 63 L. Ed. 497; Jin Fuey Moy vs. United States, 254 U. S. 189-192, (65 L. Ed. 214); State of Minnesota vs. Martinson, 256 U. S. 41, 65 L. Ed. 819; United States vs. Balint, 258 U. S. 250, 253, 254, 66 L. Ed. 604, 606; United States vs. Behrman, 258 U. S. 280, 66 L. Ed. 619; United States vs. Wong Sing, 260 U. S. 18, 67 L. Ed. 105; Linder vs. United States, 268 U. S. 5, 66 L. Ed. 819; United States vs. Daugherty, 269 U. S. 360, 70 L. Ed. 309; Boyd vs. United States, 271 U. S. 104, 70 L. Ed. 857; Alston vs. United States, 274 U. S. 289, 71 L. Ed. 1052; Nigro vs. United States, 276 U. S. 332, 72 L. Ed. 600; Casey vs. United States, 276 U. S. 413, 72 L. Ed. 632; Blockberger vs. United States, 284, U. S. 299, 76 L. Ed. 306.

(4)

A conviction without any evidence of the commission of a criminal or unlawful act, or under an unconstitutional statute, or by reason of an unconstitutional application of a valid law or under an indictment that does not state an offense, is a denial of due process and it appearing from undisputed evidence that the conviction had been obtained in violation of one or more of the principles stated, the Circuit Court of Appeals should have reversed the judgment regardless of objection or exception in the trial court and regardless of whether

such denial of due process was brought to its attention by the original assignments of error or by petition for a rehearing.

In failing so to do the Circuit Court of Appeals disregarded the principles pronounced by this Court in Fleisher vs. United States, supra; Brasfield vs. United States, 272 U. S. 448; Bowen vs. Johnston, 306 U. S. 19, 23, 83 L. Ed. 455; Johnson vs. Zerbst, 304 U. S. 458, 82 L. Ed. 1461; Re Neilson, 131 U. S. 176, 182, 33 L. Ed. 118.

(5)

There was no evidence of any generally recognized or accepted medical standard for the use of narcotics by physicians in the treatment of addicts. Medical experts, testifying for the Government, stated that it was not proper practice to prescribe narcotics for an addict to be administered by himself (R. 128, 129, 142). Medical experts, introduced by petitioner, testified to the contrary (R. 235, 239). This conflict in the situation thus stated raises a question of importance in the trial of narcotic cases that has not been determined by this Court, to-wit: Whether a finding of bad faith on the part of a physician, prescribing narcotics, can be predicated upon the conflicting opinions of medical experts as to what constitutes proper medical practice in a particular case. While the point has not been adjudicated, such a finding seems to be in conflict with the rule pronounced by this Court in American School of Magnetic Healing vs. McAnnulty, 187 U. S. 94.

(6)

The indictment herein charges that petitioner was a "physician dispenser," and not that he issued as a practicing physician the prescriptions to which reference was therein made. A "dispensing physician," as that term is used in the statute, is a vendor of drugs (Young vs. United States, 62 S. Ct. 510, adv. sheets).

The evidence affirmatively established that petitioner did not sell narcotics (R. 199, 183), and there was neither claim nor evidence at the trial that he participated in any sale, legitimate or otherwise, except through the issuance of prescriptions as a practicing physician.

The question thus raised by the failure of the evidence to correspond to the allegations of the indictment raises a question that lies deeper than any mere variance, conviction for issuing the prescription being a conviction for an offense not charged in the indictment, and, therefore, a sheer denial of due process of law. Thornhill vs. State of Alabama, 310 U. S. 88.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the Court of Appeals for the Sixth Judicial Circuit, commanding that court to certify and send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and proceedings in the case numbered and entitled on its docket: Number 8955, Criminal, W. A. Nailling vs. United States of America, to the end that said case may be reviewed and determined by this Court as provided by Section 240 of the Judicial Code (U.

S. C. A. Title 18, Section 347), and that the Judgment of the Court of Appeals for the Sixth Circuit be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem right and proper.

L. E. GWINN,
Counsel for Petitioner,
W. A. Nailling.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941.

W. A. NAILLING,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

No.....

BRIEF AND ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of Lower Courts.

No opinion was filed in the District Court nor with the order of the Circuit Court of Appeals originally affirming the judgment. Its opinion or order denying the petition for a rehearing is as follows:

> "This case came on to be heard upon the petition for rehearing, the brief in support thereof, the answer of the appellee thereto, and the reply to the brief of the appellee; on consideration whereof, it appearing that the appellant was convicted of selling narcotics in violation of Section 2554 (a), I. R. C.:
>
> And it appearing that appellant has been tried twice under the indictment herein; and that the principal questions raised in the petition for rehearing were not called to the attention of the Dis-

trict Court, the record showing that no demurrer was filed, no application for a bill of particulars was made, no objections or exceptions were taken and no request was made to charge the jury; and it appearing that these questions were not raised at the hearing on the merits in this court, and that the judgment is not to be reversed under such circumstances unless clear miscarriage of justice is shown; *Miller vs. United States*, 300 Fed. 529 (C. C. A. 6), certiorari denied, 266 U. S. 624;

And it appearing that while the indictment charges that the sale of morphine sulphate was not made in pursuance of a written order on a form issued by the Commissioner of Internal Revenue, and Section 2554 (a) requires that the order be written on "a form to be issued" by the Secretary of the Treasury, the Secretary is authorized by statute to delegate and has delegated authority to the Commissioner of Internal Revenue to issue such order forms. Act of March 3, 1927 (44 Stat. 1381, Sections 4 (a) and 4 (b); Treas. Dec. No. 3999, issued March 18, 1927; Treas. Dec. No. 1 (Bureau of Prohibition), issued April 1, 1927; Act of June 14, 1930 (46 Stat. 585, Section 3 (b); Treas. Dec. No. 2 (Bureau of Narcotics), issued July 1, 1930; Section 2606, Title 26, I. R. C.; Treas. Dec. No. 4884, issued February 11, 1939;

And it appearing that the indictment sufficiently apprised the appellant of the charge against him and is sufficiently specific to bar a second conviction for the same offense, and that there is no clear miscarriage of justice shown by the present record:

It is ordered that the petition for rehearing be, and it hereby is, denied."

II.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code (U. S. C. A., Title 28, Sec. 347).

The order denying the petition for a rehearing, seasonably filed and entertained, was denied February 9, 1942, and this petition for the writ of certiorari is filed within the time allowed by Rule XI of the Rules of Practice and Procedure adopted by this Court May 7, 1934.

The transcript of the record, including proceedings in the Circuit Court of Appeals, has been filed herewith as required by Rule 38 of this Court.

III.

Specifications of Error.

(1) The indictment herein, and for reasons shown in the petition, does not state an offense under Section 2554 of the Internal Revenue Code.

(2) The Circuit Court of Appeals erred in failing and refusing to apply corrective processes when it was brought to its attention by the petition for rehearing that the undisputed evidence showed that the prescriptions complained of in the indictment were issued by petitioner in the course of his professional practice and as such were not within the operation of Section 2554 of the Internal Revenue Code.

(3) The Circuit Court of Appeals erred in failing and refusing, when requested so to do by petition for re-

hearing, seasonably filed and entertained by that Court, to protect petitioner against an arbitrary and unconstitutional application of Section 2554 whereby he was punished for acts that were not within the scope thereof and could not be brought under its operation without a violation of the 10th Amendment to the Federal Constitution.

(4) The Circuit Court of Appeals erred in failing and refusing to hold that in the absence of any evidence showing an approved or generally accepted standard of professional practice in treating addicts, that a verdict of guilt could not be predicated upon the conflicting opinions of medical experts as to what constituted proper professional practice.

IV.

Material Facts.

Petitioner, 69 years of age, was a highly trained physician and surgeon (R. 148, 149, 205). He owned and operated a hospital and clinic at Union City, Tennessee, from 1912 to the date of his trial, and during that period had personally performed thousands of operations (R. 149). His practice was extensive (R. 46, 52, 88, 149), successful (R. 211), and he owned a large amount of property in and around Union City, including his hospital building, other business property, a half interest in a manufacturing establishment, thirty-five or forty residences, and six or eight farms. During his cross examination, and over his protest, petitioner was required to list these properties which the Government attorney insisted had an assessed valuation of $250,000 (R. 166-168).

Issuing narcotic prescriptions was an inconsequential part of his general practice. There was nothing unusual about these prescriptions, filled and preserved by local druggist, nor were they out of line with those issued by other doctors (R. 45, 51, 89, 94, 115, 213, 217).

An unusual array of character witnesses, both men and women, including farmers, merchants, bankers, physicians, lawyers, ministers, state and federal officials, testified to his good reputation (R. 200, 221-231).

On or about the dates alleged in the several counts of the indictment on which convictions were had, covering a period from June 1 to June 9, 1940, petitioner issued prescriptions to one Harry P. Dezonia, a drug addict, issuing him a prescription on each day during that period except June 2. Each of these prescriptions called for twenty one-fourth grains of morphine sulphate or a total of five grains of that drug. (R. 43.)

All of these prescriptions were issued by petitioner in his office and while Dezonia was there in person (R. 109, 199, 200).

Dezonia, 59 years of age, was chief dispatcher and train master for the Illinois Central Railroad when he acquired the drug habit in 1921 as the result of a treatment to relieve pain which he suffered from chronic catarrhal sinus (R. 107).

At the time of the transactions involved in the indictment, Dezonia was temporarily in Union City, soliciting advertising (R. 113). During the period of his addiction, he had taken many treatments therefor, and, as stated

by him, would sometimes be "off the dope" for two or three years, but he had again been using it for about six months when given the prescriptions by petitioner (R. 107-108).

Petitioner, personally acquainted with Dezonia for many years, had occasionally given him prescriptions for narcotics, and knew that he could personally take during a twenty-four hour period twice the amount of morphine prescribed for him on any of the occasions involved in the indictment (R. 162). Dezonia personally used all the morphine prescribed for him by petitioner, and there was no reason to believe that he would do otherwise (R. 245).

Dezonia, in connection with the prescriptions given him by petitioner between June 1 and June 9, 1940, was advised by petitioner to go to an institution for treatment and told by the latter that he would only prescribe for him until "such time as he could get out of town" (R. 162, 163). Dezonia agreed to follow petitioner's advice and submitted to him a letter from a narcotic institution at Lexington, Kentucky, arranging for his admission there "as soon as he finished his Union City contract" (R. 162, 163).

Dezonia, when petitioner prescribed for him, was suffering pain in all parts of his body (R. 113). The prescriptions given were not in excess of his requirements, and without them he could not have finished his work at Union City (R. 200).

According to the testimony of petitioner, Dezonia in June, 1940, when the prescriptions were issued him, had

enteritis and sciatica or neuritis and had pains in various parts of his body, "one day here and one day there," and that these pains were not solely the result of drug addiction (R. 198); that he gave the prescription to Dezonia "to control the pain and make him slightly useful" (R. 197); that the morphine prescribed helped the enteritis (R. 199); that Dezonia could not have continued his work at Union City without such prescriptions (R. 200); that he did not prescribe in excess of Dezonia's requirement (R. 198).

It does not appear that any other physician diagnosed the condition of Dezonia at or about the time these prescriptions were issued to him and while he testifies that there was nothing wrong with him "aside from the sinus trouble and drug habit" (R. 119), he admits that when the prescrpitions were issued he complained of intense pain (R. 115) and that such "pain was felt in all parts of his body, which became very excruciating" (R. 113), and that his sinus troubled him frequently and was "*very severe*" (R. 114-115).

With respect to the foregoing difference of opinion between Dezonia and petitioner, it is our view that Dezonia's conclusion as to the diseases from which he suffered is destitute of probative value when weighed against the expert opinion of a competent physician, but be that as it may, the conflict is not material unless the statute prohibits a physician from dispensing narcotics to an addict, who suffers addiction alone.

ARGUMENT.

Substantial errors should be corrected by a reviewing court regardless of objection, exception or assignment of error.

> Brasfield vs. U. S., 272 U. S. 448, 71 L. Ed. 345;
> Weems vs. U. S., 217 U. S. 549, 54 L. Ed. 793;
> Crawford vs. U. S., 212 U. S. 183, 53 L. Ed. 465;
> Berger vs. U. S., 295 U. S. 78, 79 L. Ed. 1314;
> New York Central R. R. Co. vs. Johnson, 279 U. S. 310, 73 L. Ed. 706;

A trial in the Federal courts, involving the liberty of the citizens, is not a mere game of skill between adversary counsel, however, experienced or inexperienced they may be, and acting upon that assumption, petitioner invoked the foregoing principle in the petition for a rehearing. He invokes it now.

The argument, designed to establish that the indictment is fatally defective, and that petitioner was convicted as the result of an arbitrary and unconstitutional application of Section 2554 of the internal revenue Code, will be set forth under three headings, and these to some extent summarize the argument.

Preliminary to that argument we state our contention that the statute, while not authorizing a physician to sell Narcotics under the cloak of his profession, does license a physician to do the things done by petitioner in the instant case. Pertinent to that contention is the language used by Yankwich, District Judge, in United States vs. Anthony, 15 Fed. Supp., 553 from which we quote as follows:

> "I am satisfied, therefore, that the Linder Case, and the cases which interpret it, lay down the rule

definitely that the statute does not say what drugs a physician may prescribe to an addict. Nor does it say the quantity which a physician may or may not prescribe. Nor does it regulate the frequency of the prescriptions. Any attempt to so interpret the statute, by an administrative interpretation, whether that administrative interpretation be oral, in writing, or by an officer or by a regulation of the department, would be not only contrary to the law, but would also make the law unconstitutional as being clearly a regulation of the practice of medicine."

I.

The Indictment Herein Is Fatally Defective, and These Defects Being Substantial and Material, Not Merely Formal or Technical, Its Validity May First Be Challenged in the Reviewing Court.

The rule is, as we conceive it, that formal or technical defects are waived by failure to file a demurrer or motion to quash before the trial and that the verdict cures many defects that might sustain a demurrer or motion to quash the indictment. But where the indictment omits an essential element of the offense attempted to be charged, objection may be made even after verdict.

Fleisher vs. U. S., 302 U. S. 218;
Hardesty vs. United States, 6th Circuit, 168 Fed. 25;
Shilter vs. United States, 9th Circuit, 257 Fed. 724;
Cohn vs. United States, 2nd Circuit, 258 Fed. 355;
Goulson vs. U. S., 6th Circuit, 16 F. 2d 44;
Danaher vs. U. S., 8th Circuit, 39 F. 2d 325, 331;
Harris vs. U. S., 8th Circuit, 104 F. 2d 41, 43;
United States vs. Leach (District Court, E. D. Michigan), 291 F. 788.

Defects of substance in the indictment include:

(1) *It does not designate the purchaser.* This is an essential element of a valid indictment for the offense attempted to be charged. Miller vs. United States, 5th Cir., 288 F. 816.

It appears to be the established practice to designate the name of purchaser when a sale is alleged, and so well established is this practice that Judge Otis in United States vs. Hipsch, 34 Fed. Supp. 270, 274, citing Manning vs. U. S., 8th Cir., 31 Fed. 2d 911, 913, refers to such an indictment as being in the "stereotyped form."

(2) *The indictment does not allege that petitioner issued the prescriptions* charged as the means through which sales were made nor that he filled such prescriptions when issued by others. It alleges, however, that he was a "physician dispenser" (R. 21). A "dispensing physician," as that term is used in the Harrison Anti-Narcotic Act, means a vendor of narcotics and not a practicing physician. Young vs. United States, decided Feb. 2, 1942, 62 S. Ct. 510. At the trial, however, there was neither claim nor evidence that petitioner filled any prescriptions, issued by others nor sold narcotics except by means of prescriptions that were filled in good faith by druggists.

If the indictment, alleging that petitioner was a "physician dispenser," could be stretched into a charge that he personally sold narcotics or filled prescriptions, the position of the government would not be improved. There was not a scintilla of evidence of the commission of a criminal or an unlawful act and in that situation conviction would be a denial of due process.

If the evidence should be construed, however strained that construction might be, as showing that petitioner unlawfully issued the prescriptions, that construction would not warrant his conviction since the indictment does not charge that he issued the prescriptions, and conviction on a charge not made in the indictment is a sheer denial of due process of law. Thornhill vs. State of Alabama, 310 U. S. 88.

(3) *The indictment alleges that the sale was not in pursuance of a written order on a form issued by the "Commissioner of Internal Revenue," and such allegation does not state an offense under the statute.*

The offense denounced by Section 2554 is a sale that is not made on a "*particular form of order*" which the purchaser must give the seller, and the offender is "*punished for not using the forms, as the statute requires, or for misusing them.*" Nigro vs. United States, 276 U. S. 332, 345, 351.

The act of December 17, 1914, required that the order form be issued by the "Commissioner of Internal Revenue" but the "particular form of order" required by Section 2554, as it existed at the time of the alleged offenses, if such they be, were committed, was a "written order . . . on a form to be issued by the *Secretary.*" (Italics ours.)

The provision that the form be issued by the "Secretary" is as material as any other part of the Statute and its omission was fatal to the validity of the indictment under the principle stated in Kutler vs. U. S. 3rd Cir., 79 F2d 440, in which the Court said:

> "Where an essential word or clause is omitted from an indictment, such omission is fatal to the

indictment even though the Court may know what was intended."

The provision under consideration is not a mere exception but an essential element of the offense created by the section. But if treated as an exception, its negation would be an indispensable element of a valid indictment. Hale vs. U. S., 4th Cir., 89 F2d 578, 579.

As the defects complained of are substantial, not formal or technical, they are not cured by Title 18, Section 556 of the United States Code. Hagner vs. U. S., 285 U. S. 427; Stumbo vs. United States, 7th Cir., 90 F2d 828.

Nor could the omission of such essential averments have been corrected by a bill of particulars whose office is not to make a bad indictment good but to aid a valid indictment by making the charge more specific or furnishing such additional information as may be reasonably necessary to enable the accused properly to prepare his defense. Floren vs. U. S., 8th Cir., 186 F. 961.

As we construe the opinion in Fleisher, petitioner, vs. United States of America, 302 U. S. 218, 220, it conclusively establishes that the indictment herein is fatally defective and also the right of the petitioner to challenge its validity in the reviewing court without having done so in the trial court.

In the Fleisher case the validity of indictment does not appear to have been questioned either in the trial court or in the Circuit Court of Appeals (91 F2d 404), but this court granted certiorari limited to the question of

whether or not the first count of the indictment stated an offense.

The statute under consideration in the Fleisher case required persons possessing distilling apparatus to register the same with "District supervisor of the Alcoholic Tax Unit in the Bureau of Internal Revenue." The indictment charged failure to register such apparatus "with the collector of Internal Revenue" and this Court held that it did not state an offense under the statute.

Practically the same question is raised by the petition here, and we presume that the government, as it did in that case, will concede error unless valid Treasury Regulations have modified the statute as held by the Circuit Court of Appeals.

As to the Treasury Regulations petitioner states two contentions:

(1) The Act of June 14, 1930, (c. 480, Sec. 3, 46 Stat. 586, U. S. Code, Title 5, Sec. 282 b) restricts the authority that may be delegated by the Secretary of the Treasury with respect to order forms to a delegation of such authority to the Commissioner of Narcotics.

That Section and other pertinent statutes are as follows:

United States Code, Title 5, Sec. 282 b, Subsection (a):

> "The Secretary of the Treasury is authorized to confer or impose any of the rights, privileges, powers, and duties in respect of narcotic drugs enumerated in subdivision (a) of section 281 c of this title, upon the Commissioner of Narcotics, or any officer or employee of the Bureau of Narcotics.

United States Code, Title 5, Sec. 281 c, Subsection (a):

> "The rights, privileges, powers and duties conferred or imposed upon the Commissioner of Internal Revenue and his assistants, agents, and inspectors, by any law in respect of the taxation, importation, exportation, transportation, manufacture, production, compounding, sale, exchange, dispensing, giving away, possession, or use of narcotic drugs are hereby transferred to, and conferred and imposed upon, the Secretary of the Treasury." (Mar. 3, 1927, c. 348, No. 4 (a), 44 Stat. 1382.)

Internal Revenue Code, Section 2606:

> "The Secretary is authorized to confer or impose any of the rights, privileges, powers, and duties in respect of narcotic drugs conferred upon him by subchapter A and B of this chapter and part V of subchapter A of chapter 27 upon the Commissioner of Narcotics, or any officer or employee of the Bureau of Narcotics, and to confer or impose upon the Commissioner of Internal Revenue, or any of the officers or employees of the Bureau of Internal Revenue, any of such rights, privileges, powers, and duties which, in the opinion of the Secretary, may be necessary in connection with internal revenue taxes. 53 Stat., 283."

It will be observed that Title 5, section 281 c, enumerates "taxation" with many other matters to which it refers and Section 282 b, subsection a of the same title, authorizes the Secretary of the Treasury to delegate all powers conferred upon him by section 281 c to the Commissioner of Narcotics.

Section 2606 authorizes the Secretary of the Treasury to delegate powers to the Commissioner of Internal

Revenue with respect to "Internal Revenue taxes" but does not otherwise authorize the transfer of power to that official with respect to the matters set out in Section 281 c, subsection a, which the Secretary was authorized by section 282 b, subsection a, to confer upon the Commissioner of Narcotics, "taxation" being only one of the matters enumerated in section 281 c, subsection a.

(2) The regulations impose no duties upon and transfer no powers to the Commissioner of Internal Revenue with respect to order forms. Section 3, subsection 1-d, Treasury Decision No. 2, issued July 1, 1930, expressly confers upon the Commissioner of Narcotics the powers of the Secretary of the Treasury with respect to the "*prescribing of forms and order forms,*" doing this, however, without any statement of intent to modify the statute as written, but making the exercise of powers therein delegated to the Commissioner of Narcotics subject to the supervision of the Secretary of the Treasury.

Section 4 of Treasury Decision No. 2, expressly delegates to the Commissioner of Narcotics the powers with respect to the matters included in Section 3 that had theretofore been exercised by agents and employees of the Commissioner of Internal Revenue.

Section 5 confers upon the Commissioner of Internal Revenue such powers as had not been delegated to the Commissioner of Narcotics but the specific recitals of sections 3 and 4 control any general delegation of power in section 5.

Sections 3, 4 and 5 of Treasury Decision No. 2 are set out in full in the appendix to this brief.

II.

A Conviction Without Any Evidence of the Commission of a Criminal or Unlawful Act, or Under An Unconstitutional Statute, or By Reason of An Unconstitutional Application of a Valid Law, Is a Denial of Due Process; and Where Such Appears From the Record In A Criminal Case and Is Brought to the Attention of The Appellate Court, the Judgment Should be Set Aside Regardless of Questions Raised in the Trial Court or Errors Assigned in the Reviewing Court.

So imperative is the duty of Federal courts to protect the constitutional rights of the accused that the remedy of *habeas corpus* is available if constitutional rights were denied in the proceedings that resulted in conviction.

Bowen vs. Johnston, 306 U. S. 19, 24, 83 L. Ed. 455;
Johnson vs. Zerbst, 304 U. S. 458, 467, 82 L. Ed. 1461;
Re Nielson, 131 U. S. 176, 182, 33 L. Ed. 118.

And as heretofore shown it is the practice to protect the substantial rights of the accused when a violation thereof is called to the attention of the reviewing court on appeal, even though objection was not made nor exception taken in the trial court.

As we construe the statute under which appellant was convicted, it does not prohibit the acts that resulted in his conviction.

If correct in that view, which will later be more fully presented, the constitutionality of the statute need not be considered.

If the prescriptions issued to Dezonia were not prohibited by the statute, a conviction therefor would be a

denial of due process of law in that there would be no evidence of the commission of a criminal act.

Herndon vs. Lowry, 301 U. S. 242, 81 L. Ed. 1066;
De Jonge vs. Oregon, 299 U. S. 353, 362, 81 L. Ed. 278, 282;
Fiske vs. Kansas, 274 U. S. 380, 71 L. Ed. 1108;
Stromberg vs. California, 283 U. S. 359, 75 L. Ed. 1117.

The validity of the Harrison Act has been sustained by the Supreme Court against the attacks thereon it has considered, this being done, as hereinafter shown, in each instance by a divided court. However, the constitutionality of a statute is not determined by its provisions, abstractly considered, but by the application thereof (Fiske vs. Kansas, 274 U. S. 380), and a statute which is valid when applied to one set of facts may be unconstitutional in its application to another and a different set of facts. Abie State Bank vs. Bryan, 282 U. S. 765.

Title 26, Section 2554, would be unconstitutional if so construed and applied as to punish appellant for issuing the prescriptions involved in the several counts on which he was convicted. The grounds for the conclusion thus stated are:

(1) The statute says nothing about "addicts," does not exclude them from the operation of the term "patient" for which a physician is authorized to prescribe narcotics in the course of his professional practice, and does not adopt any definite standard by which the quantity to be administered or prescribed for a particular addict may be determined.

It is a "*fundamental concept of the common law that crime must be defined with appropriate definiteness.*"

Pierce v. United States, decided December 8, 1941, (62 S. Ct. 237);
Lanzetta v. New Jersey, 306 U. S. 451, 83 L. Ed. 888;
Herndon v. Lowry, 301 U. S. 242, 81 L. Ed. 1066.

And unless a sufficiently ascertainable standard of guilt, essential to due process, may be found in the statute, it is void as in conflict with the due process requirements of the Federal Constitution. Herndon vs. Lowry, supra.

Obviously the same rule is applicable in construing an exception to the operation of a statute.

In the instant case there is no evidence of any established or generally accepted medical standard for the treatment of addicts, and in the absence of such evidence it must be presumed that appellant prescribed properly for Dezonia who came to his office seeking relief from the intense pain which the undisputed evidence shows he suffered when the prescriptions were obtained. A contrary conclusion can not be based upon the conflicting opinions of medical experts that appellant should not have prescribed narcotics for Dezonia and particularly where some of these opinions rest upon the concept that the Harrison Act prohibits the prescription of narcotics for an addict.

If a line is drawn between a sale of drugs or narcotics by a physician to any person desiring to purchase the same and the prescription of a quantity not in excess of the reasonable requirements of the patient for a limited period, so as to avoid any probability that he will sell

or dispose of the drugs to others, regulations drawing that line may be upheld as necessary to effectuate the objects of the act as a revenue measure.

But to construe it as regulating or attempting to control the precise quantity of narcotics that may be prescribed for an addict by a physician without setting out any standard by which that quantity is to be measured, brings the act in conflict with the due process requirements of the Federal Constitution.

It may be conceded that regulations intended to effectuate the act as a revenue measure might require that a physician conform his practice to generally accepted medical standards, but that is not the question here presented. Consistent with due process the liberty of a physician may not be made to depend upon the whim or caprice of a jury, left without any guide as to what constitutes proper medical practice except the conflicting opinions of medical experts.

(2) So to apply the statute as to punish appellant for the prescriptions issued to Dezonia is to convert it from a revenue act into a regulation of the practice of medicine. This point will be presented in connection with the discussion of the decisions of the Supreme Court which follows.

The act of December 17, 1914, commonly designated as the Harrison Narcotic Law, has been applied to different states of facts in the following cases:

United States v. Jin Fuey Moy, 241 U. S. 394, 60 L. Ed. 1061;

United States v. Doremus, 249 U. S. 86, 63 L. Ed. 493;

Webb v. United States, 249 U. S. 96, 63 L. Ed. 497;
Jin Fuey Moy v. United States, 254 U. S. 189-192, (65 L. Ed. 214);
State of Minnesota v. Martinson, 256 U. S. 41, 65 L. Ed. 819;
United States v. Balint, 258 U. S. 250, 253, 254, 66 L. Ed. 604, 606;
United States v. Behrman, 258 U. S. 280, 66 L. Ed. 619;
United States v. Wong Sing, 260 U. S. 18, 67 L. Ed. 105;
Linder v. United States, 268 U. S. 5, 66 L. Ed. 819;
United States v. Daugherty, 269 U. S. 360, 70 L. Ed. 309;
Boyd v. United States, 271 U. S. 104, 70 L. Ed. 857;
Alston v. United States, 274 U. S. 289, 71 L. Ed. 1052;
Nigro v. United States, 276 U. S. 332, 72 L. Ed. 600;
Casey v. United States, 276 U. S. 413, 72 L. Ed. 632;
Blockberger v. United States, 284 U. S. 299, 76 L. Ed. 306;
Young v. U. S., 62 S. Ct. 510.

The indictment herein alleges sales in violation of that part of the statute set out in Title 26, Section 2554 of the United States Code and we shall briefly refer to the decisions of the Supreme Court above cited in considering whether the prescriptions issued to Dezonia bring appellant under its condemnation.

In the first of these cases, United States vs. Jin Fuey Moy, 241 U. S. 394, the court sustained a decision of the District Court in quashing an indictment which charged a violation of the statute. The opinion refers to the statute as a "registration and taxing act" and speaking of its objects further said:

> "It may be assumed that the statute has a moral end as well as revenue in view, but we are of opinion

> that the district court, in treating those ends as to be reached only through a revenue measure, and within the limits of a revenue measure, was right."

In United States vs. Doremus, the Court sustained the validity of the statute. Chief Justice White and Justices McKenna, Van Devanter and McReynolds dissented on the ground that it was an attempt by Congress to exert a power not delegated but reserved to the States. But each count of the indictment sustained in that case charged that the accused distributed or dispensed *five hundred doses* of morphine to a person named therein for the purpose of gratifying an appetite for the drug and the opinion of majority held that the addict "may not have used this great number of doses for himself" and that the quantity prescribed put it within his power to sell same to others without paying the tax.

In Webb vs. United States, decided on the same date as United States vs. Doremus, the same four Justices dissenting, the court held that it would be a plain perversion of the meaning of the word "prescription" to say that the orders for morphine in that case were prescriptions issued by a physician in the course of his practice. Many of the prescriptions involved in the Webb case were made out in fictitious names, were issued without regard to individual cases, and more than four thousand prescriptions has been issued by the physician during a period of eleven months.

In Jin Fuey Moy vs. United States, 254 U. S. 181, prescriptions, some of them to fictitious persons, calling for large quantities of morphine were furnished indiscriminately to persons who were not patients by a physician

who issued hundreds of prescriptions for narcotics each month.

In State of Minnesota ex rel, vs. Martinson, the court sustained the validity of a statute of the State of Minnesota, regulating the sale of narcotics in that State, and held that such regulation was a valid exercise of the police power of the State which did not interfere "with the enforcement of the Federal Revenue Law," the Harrison Act, which the opinion stated had been sustained as a valid exercise of Congressional power "to levy excise taxes."

In U. S. vs. Balint, the Court based its holding that the statute was violated, although the seller did not know that the drugs sold were narcotics, on the ground that it was a "taxing act, with the incidental purpose of minimizing the spread of addiction."

In U. S. vs. Behrman, the court sustained the validity of an indictment which charged the unlawful issuance of a prescription to one King for one hundred and fifty grains of heroin, 360 grains of morphine, and 210 grains of cocaine. These constituted "more than 3,000 ordinary doses" of the drugs. On the ground that a prescription for such an "enormous number of doses" could only result in the gratification of a diseased appetite of the addict or an "unlawful parting with them to others," the validity of the indictment was sustained. There was a dissenting opinion by Justice Holmes, concurred in by Justices McReynolds and Brandeis.

In U. S. vs. Wong Sing the court held that "prescribed conditions designed to make effective" the act "as a

revenue measure" could be imposed upon the purchaser as well as the seller.

Linder vs. U. S., supra, expressly holds that the Harrison Act is "essentially a revenue measure, and its provisions must be reasonably applied with the primary view of enforcing the special tax"; that the act did not prohibit the administration or prescription of narcotics for addicts, "diseased and proper subjects for such treatment"; that narcotics might be prescribed or administered for "relief of conditions incident to addiction"; that where the quantity prescribed was such that there was *"no reasonable probability"* that the addict would sell or otherwise dispose of the narcotics prescribed, it could not be held that a physician giving such a prescription "necessarily transcended the limits of that professional conduct with which Congress never intended to interfere."

United States vs. Daugherty expresses doubt as to the constitutionality of the act but the question there decided, relating to the validity of certain sentences imposed, has no bearing on any issue presented here.

In Boyd vs. U. S. the evidence showed that the prescriptions in question were *"grossly excessive and unreasonable according to any fair medical standard."* Although the record disclosed that the accused was both distributing and prescribing "most unusual quantities of the drug," the opinion clearly recognizes that it is admissible for a physician in his professional practice to prescribe the drug *either "for curing the patient" or for "the relief of suffering" incident to addiction.*

Alston vs. U. S. holds that Congress under its taxing powers may prohibit purchases except in or from the original stamped package.

In Nigro vs. U. S. the majority opinion held that the words "any person" in Section 2 of the Act of December 17, 1914 (Title 26, Section 2554), were not limited to those required to register and pay a tax by Section 1 of the Act. In the majority opinion the court said:

> "In interpreting the act, we must assume that it is a taxing measure, or otherwise it would be no law at all."

Justices McReynolds, Butler and Sutherland dissented on the ground that the act as therein construed was unconstitutional.

Casey vs. United States dealt with presumptions arising from the possession of unstamped drugs. There was a dissenting opinion, concurred in by Justices McReynolds, Butler, Brandeis and Sanford. In his dissenting opinion Justice Butler said:

> "And it is always to be remembered that this act is to be construed as a measure to 'lay and collect taxes.' It has no other legal existence."

In Blockberger vs. United States, 284 U. S. 299, the court again emphasizes the point that the Harrison Act is essentially a revenue measure, saying:

> "The statute is not aimed at sales of the forbidden drugs qua sales, *a matter entirely beyond the authority of Congress*, but at sales of such drugs in violation of the requirements set forth in Sections 1 and 2, enacted as aids to the enforcement of the stamp

tax imposed by the act. See Alston v. United States, 274 U. S. 289, 294, 71 L. Ed. 1052, 1054, 47 S. Ct. 634; Nigro v. United States, 276 U. S. 332, 341, 345, 351, 72 L. Ed. 600, 603, 604, 607, 48 S. Ct. 388" (Italics ours).

As it appears without dispute in the evidence that Dezonia was suffering intense pain when the several prescriptions were given to him by appellant, that the quantities prescribed were not excessive nor the prescriptions long continued, and that there was no "reasonable probability" that Dezonia would sell or otherwise dispose of the narcotics prescribed, it is clear of doubt that these prescriptions were not unlawful under the provisions of the Harrison Act as it has been construed by the Supreme Court.

In the Linder case, decided by a unanimous court, it is said:

> "Obviously, direct control of medical practice in the states is beyond the power of the Federal government. Incidental regulation of such practice by Congress through a taxing act cannot extend to matters plainly inappropriate to reasonable enforcement of a revenue measure . . . It (the act under consideration) says nothing of 'addicts' and does not attempt to prescribe methods for their medical treatment" (See page 18 of the opinion).

That the incidental regulations therein "must be regarded as means to effectuate the objects of the act with respect to revenue" was held by the Supreme Court In Re Kollock, 165 U. S. 526, sustaining the "Oleomargarine Act."

The principle thus stated and the equally well established principle that the means selected for enforcement must bear a reasonable relation to the revenue features of a taxing act have been so repeatedly recognized and applied by the Supreme Court as not to require further emphasis.

However, as United States vs. Butler, 297 U. S. 1, 80 L. Ed. 477, cites and quotes with approval the Linder case which we regard as controlling of the issue here presented, we quote from that opinion (297 U. S. at pages 68-70) as follows:

> "From the accepted doctrine that the United States is a government of delegated powers, it follows that those not expressly granted, or reasonably to be implied from such as are conferred, are reserved to the states or to the people. To forestall any suggestion to the contrary, the Tenth Amendment was adopted. The same proposition, otherwise stated, is that powers not granted are prohibited. None to regulate agricultural production is given, and therefore legislation by Congress for that purpose is forbidden.
>
> "It is an established principle that the attainment of a prohibited end may not be accomplished under the pretext of the exertion of powers which are granted.
>
> " 'Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.' M'Culloch v. Maryland, 4 Wheat. 316, 423, 4 L. Ed. 579, 605.
>
> " 'Congress cannot, under the pretext of executing

delegated power, pass laws for the accomplishment of objects not intrusted to the Federal Government. And we accept as established doctrine that any provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power but solely to the achievement of something plainly within power reserved to the States, is invalid and cannot be enforced.' Linder v. United States, 268 U. S. 5, 17. 69 L. Ed. 819, 823, 45 S. Ct. 446, 39 A. L. R. 229.

"These principles are as applicable to the power to lay taxes as to any other federal power.

* * *

"*In Linder v. United States*, 268 *U. S.* 5, 69 *L. Ed.* 819, 45 *S. Ct.* 446, 39 *A. L. R.* 229, *supra, we held that the power to tax could not justify the regulation of the practice of a profession, under the pretext of raising revenue.*" (Italics ours.)

III.

A Finding of Bad Faith in the Administration of Narcotics May Not be Predicated on the Conflicting Opinions of Medical Experts.

The foregoing proposition is sustained by American School of Magnetic Healing vs. McAnnulty, 187 U. S. 94, 47 L. Ed. 90 and Stunz vs. U. S., 8th Cir. 27 F. 2d 575.

In the instant case, the Government offers no evidence to show that there was any generally accepted professional standard for the treatment of addicts. At most, its expert witnesses stated an opinion that a certain course was not a proper practice, but there was no claim by these witnesses or any of them that the view thus expressed was based on generally accepted medical standards.

In this situation, and in view of the testimony of other physicians that appellant's prescriptions were within the bounds of legitimate practice, the testimony of the Government experts is not an adequate basis for a verdict which must rest upon evidence that appellant was not practicing medicine but selling drugs when he prescribed for Dezonia.

CONCLUSION.

In conclusion we wish to emphasize certain points which we regard as of controlling importance.

(1) The prescriptions issued by petitioner were filled by druggists who were registered to sell narcotics, kept records thereof as required by law, and these prescriptions were available for inspection by narcotic agents and were inspected by them over a period of years (R. 43, 45, 117, 118). The trial Judge permitted the Government to prove the issuance of prescriptions other than those referred to in the indictment and the number of such prescriptions offered or referred to in the evidence were nine for Inez Loomis (R. 91), these being issued between February, 1939, and August, 1940, to Mrs. Loomis, who was not an addict but suffered from a chronic ailment (R. 201-202); twenty prescriptions for E. Z. Griffin between June 2 and October 13, 1940, Griffin having sciatica for which he was also treated by petitioner who advised him to go to a narcotic institution for a cure, which he did (R. 202, 219, 220); sixteen prescriptions for Mrs. Alberta Saunders between June 7 and July 27, 1940, she being afflicted with syphilis and fistula, for which she was treated by petitioner (R. 202, 203); thirty-one prescriptions for N. S. Frazier be-

tween June 11 and September 13, 1940, who, in addition to being an addict, had tuberculosis (R. 203) and thirty-six prescriptions between September 11, 1940, and October 20, 1940, for one Welch, who had cancer of the stomach and who on occasions had been given by other physicians much larger quantities of the drug than those prescribed for him by petitioner (R. 204). As to the Welch prescriptions, petitioner did not prescribe for him until requested to do so by the County Judge of Obion County, in which Union City is located, and by the Mayor of that town, the latter being a brother of the United States Marshal for the Western District of Tennessee, who also resides in Union City (R. 111, 209-212).

(2) There were nine prescriptions involved in the counts on which petitioner was acquitted (R. 1-15). Two of these were issued to James M. Cooksey, a decoy (R. 14-15) who was not introduced as a witness in the case. Cooksey had a serious bone disease, from which he was suffering intense pain, and petitioner advised him to go to Memphis to a charity hospital for an operation (R. 163-164). The other seven were issued to a prostitute, or a woman living with a man to whom she was not married (R. 99, 101), used as a decoy by Harry F. Reinert, a narcotic agent, who introduced her to petitioner as his wife (R. 102), and acting on his instructions she represented to petitioner that she had neuritis (R. 75). Petitioner informed her that she had menopausal neuritis and gave her by hypodermic an injection other than narcotics for that trouble, this being a serum, which she objected to taking but which he then and there administered to her (R. 101-103). Considering the fraud which the undisputed evidence shows was practiced on petitioner by the narcotic agents by sending Cooksey and Mrs. Louise

Maynard, alias Mrs. Charles Anderson, to petitioner, it can be readily understood why the jury acquitted petitioner under the counts involving these prescriptions but that is not the point here stressed. *The total number of prescriptions, including those given these decoys, constituted only an inconsequential part of the prescriptions issued by petitioner for other purposes in his general practice.* He treated on an average 25 to 30 patients a day and at times the extent of his practice would be such that he would issue several thousand prescriptions during the course of a year (149). In 1934 petitioner paid Two Hundred ($200) Dollars to the Narcotic Division in order to avoid the notoriety and expense incident to litigation and without consulting counsel (R. 199). With that experience, knowing of the investigations regularly made and believing that there was "pressure" back of such investigations as they affected him (R. 199), it is inconceivable that petitioner would have prescribed narcotics otherwise than in good faith.

(3) As we interpret the statute, petitioner did nothing except what he had a strict legal right to do. But be that as it may, in view of the undisputed evidence that the practice followed by him was in line with the course pursued by reputable physicians generally (R. 45, 94, 240, 244), and the testimony of the expert medical witnesses for the Government that they refused to treat addicts at all, (R. 128, 139), one of them basing such refusal on his understanding that the federal statute prohibited a physician from prescribing narcotics for an addict (R. 134), the lack of any definite standard in the narcotic regulations. (Reg. No. 151. 168, Title 26, p. 1197), and the proven effort of narcotic agent by administrative interpretation to extend the act beyond its scope as

limited by the decision of this court in the Linder case (R. 216), it seems clear of doubt that there should be further clarification of the act and definition of its terms by this court in order that physicians may know what is permitted and what is prohibited by its terms, and particularly whether the criterion by which their guilt or innocence is to be determined is their own judgment as to the needs of the patient in particular cases or that of some other physician who refuses to treat such cases at all.

(4) Regulations, having the force of law, when authorized by law and exercised in accordance with some standard fixed in the law, have been repeatedly upheld by this court, but so far as we have been able to discover the principle has not been extended to the point where the regulations may change an essential element of a statutory crime. Such an extension, using a phrase that appears in the concurring opinion of Justice Cordozo in the Schechter case, would seem to be "*delegation running riot.*"

It is therefore respectfully submitted that the petition should be granted.

L. E. GWINN,
Attorney for Petitioner.

APPENDIX.

(T. D. No. 2)

Order of the Secretary of the Treasury Prescribing the Duties and Powers of the Commissioner and Other Officers and Employees of the Bureau of Narcotics, * *

July 1, 1930.

In pursuance of the authority conferred upon the Secretary of the Treasury by the act entitled "An Act to create in the Treasury Department a Bureau of Narcotics, and for other purposes," approved June 14, 1930, as amended, it is hereby ordered as follows:

* * *

III. Rights, Privileges, Powers, and Duties Conferred and Imposed Upon the Commissioner of Narcotics.

(1) There are hereby conferred and imposed upon the Commissioner of Narcotics, subject to the general supervision and direction of the Secretary of the Treasury, all the rights, privileges, powers, and duties conferred or imposed upon the Commissioner of Internal Revenue (and which are transferred to and conferred and imposed upon the Secretary of the Treasury by subdivision (a) of section 4 of the act of March 3, 1927) by the act of December 17, 1914, as amended, known as the Harrison Narcotic Law, or by the act entitled "An Act regulating the manufacture of smoking opium within the United States and for other purposes," approved January 17, 1914, in so far as such rights, privileges, powers, and duties relate to—

(a) The investigation and the detection and punishment of violations of either of the above laws or any regulations issued thereunder;

(b) Exemptions from any of the provisions of the above laws;

(c) The books, records, and returns required to be kept or rendered under any of the above laws;

(d) The prescribing of forms and order forms under any of the above acts;

(e) The manner in which the record of sales, exchanges, and gifts of tax-exempt preparations and remedies containing narcotic drugs shall be kept;

(f) The manner in which application shall be made for confiscated narcotic drugs;

(g) The appointment of a committee for the certification and disposition of confiscated narcotic drugs;

(h) The compromise of any criminal or civil case arising under either of the above laws, in accordance with section 3229 of the Revised Statutes of the United States, and the determination, assertion, and compromise of liability for internal-revenue taxes and penalties under either of the above laws, except that all moneys shall be received and accounted for by collectors of internal revenue, under the direction of the Commissioner of Internal Revenue;

(i) Seizures, for violation of either of the above laws, of property, whether real or personal (except under distraint warrant), and the custody, control, sale, and disposition of property so seized;

(j) The appointment of such officers and employees as may be necessary for the execution of the functions imposed upon the Bureau of Narcotics.

(2) Power is hereby conferred upon the Commissioner of Narcotics to prescribe such regulations as he may deem necessary for the execution of the functions imposed upon him or upon the officers or employees of the Bureau of Narcotics, but all regulations and changes in regulations shall be subject to the approval of the Secretary of the Treasury.

The Commissioner of Internal Revenue and the Commissioner of Narcotics may, if they are of the opinion that the good of the service will be promoted thereby, prescribe regulations relating to internal-revenue taxes where no violation of the narcotic laws is involved, jointly, subject to the approval of the Secretary of the Treasury.

IV. Rights, Privileges, Powers, and Duties Conferred and Imposed Upon the Officers and Employees of the Bureau of Narcotics, Including the Field Service.

There are hereby conferred and imposed upon the officers and employees of the Bureau of Narcotics, including the agents, inspectors and other employees in the field service, all the rights, privileges, powers, and duties conferred or imposed upon the assistants, agents, and inspectors of the Commissioner of Internal Revenue (and which are transferred to and conferred and imposed upon the Secretary of the Treasury by subdivision (a), of section 4 of the act of March 3, 1927), by any narcotic law in so far as such rights, privileges, powers, and duties

relate to any of the matters referred to in paragraphs (a) to (j), inclusive, of Section III of this order. All such officers and employees of the Bureau of Narcotics, including the agents, inspectors, and other employees of the field service, shall have, in the performance of their functions under the narcotic drug laws, all the rights, privileges, and powers of internal revenue officers.

V. Rights, Privileges, Powers, and Duties Conferred and Imposed Upon the Commissioner of Internal Revenue.

There are hereby conferred upon the Commissioner of Internal Revenue all the rights, privileges, powers, and duties conferred or imposed upon such officer (and which are transferred to and conferred and imposed upon the Secretary of the Treasury by subdivision (a) of section 4 of the act of March 3, 1927) by any narcotic law, except such rights, privileges, powers, and duties as are hereinbefore conferred or imposed upon the Commissioner of Narcotics.

* * *

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 1042

W. A. NAILLING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The Circuit Court of Appeals affirmed the judgment of the District Court without opinion (R. 259). The order of the Circuit Court of Appeals denying a petition for rehearing (R. 276) is reported at 124 F. (2d) 431.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered December 10, 1941 (R. 259), and the petition for rehearing (R. 260–275) was denied February 9, 1942 (R. 276). The petition for a writ of certiorari was filed March 14, 1942. The

jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

I. Whether the indictment charges an offense under Section 2554 (a) of the Internal Revenue Code. This question involves the following subsidiary questions:

A. Whether the Secretary of the Treasury has authority to delegate to the Commissioner of Internal Revenue the function of issuing order forms for the purchase of narcotics, and, if so, whether the Secretary has delegated that function to the Commissioner.

B. Whether the indictment is fatally defective for failure to allege that petitioner issued the prescriptions by means of which the sales of narcotics were made, or to name the purchaser of the drugs.

II. Whether there was substantial evidence to support petitioner's conviction.

STATUTORY PROVISIONS AND ADMINISTRATIVE REGULATIONS INVOLVED

Section 2554 of the Internal Revenue Code (26 U. S. C. 2554) provides in part:

> (a) * * * It shall be unlawful for any person to sell, barter, exchange, or give away any of the drugs mentioned in section 2550 (a) except in pursuance of a written order

of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary.

* * * * *

(c) * * * Nothing contained in this section * * * shall apply—

(1) To the dispensing or distribution of any of the drugs mentioned in section 2550 (a) to a patient by a physician, dentist, or veterinary surgeon registered under section 3221 in the course of his professional practice only. * * *

The other pertinent statutory provisions and administrative regulations are set forth in the Appendix, *infra,* pp. 22–27.

STATEMENT

On January 10, 1941, petitioner, a practicing physician, was indicted in the Western District of Tennessee on seventeen counts, each charging a violation of Section 2554 (a) of the Internal Revenue Code (R. 6–25). At his first trial the jury failed to agree on a verdict (R. 274, 276), but on April 3, 1941, after retrial, petitioner was found guilty on counts 10 to 17, inclusive, which charged sales of morphine sulphate to one Harry Dezonia (R. 25–26). Petitioner was represented by counsel but did not challenge the validity or sufficiency of the indictment by demurrer or otherwise. Nor at the trial did he make any motion for a directed verdict, or request instructions to the jury or ob-

ject or except to the charge, or raise any of the questions urged in the petition (R. 253, 259, 265–266, 269–274, 276; see also Pet. 2, 29, 36). A motion for a new trial, principally on the ground that Dezonia, a witness for the Government, was not a competent witness and that the verdict was, therefore, not supported by evidence (R. 27–30), was denied (R. 32), and petitioner was sentenced on each of counts 10 to 17, inclusive, to three years' imprisonment [1] and to pay a fine of $1,250, the sentences to imprisonment to run concurrently (R. 32–33).

On appeal, petitioner assigned as error the action of the trial court in denying his motion for a new trial and approving the verdict, the assignments alleging that the verdict was not supported by competent evidence (R. 38–40).[2] The Circuit Court of Appeals affirmed without opinion (R. 259). It stated in its judgment that the only question presented related to the sufficiency of the evidence, that there was no motion for a directed verdict at the close of the evidence, and that in such circumstances it would not consider the sufficiency of the evidence unless satisfied that there

[1] The petition erroneously states (p. 1) that petitioner was sentenced to imprisonment for five years.

[2] Petitioner also assigned as error the action of the trial court in permitting the prosecuting attorney to question him concerning a prior compromise settlement between him and the Bureau of Narcotics (R. 39), but that assignment is not renewed here.

had been a miscarriage of justice. It concluded that the proof "amply" supported the verdict and that no injustice had been done (R. 259.)

In his petition for rehearing in the Circuit Court of Appeals (R. 260–275) petitioner raised for the first time the questions now urged in the petition for a writ of certiorari, as is conceded (Pet. 2). The court held in its order denying the petition for rehearing that the Secretary of the Treasury is authorized by statute to delegate, and has delegated, authority to the Comissioner of Internal Revenue to issue order forms for the purchase of narcotic drugs and that, therefore, the allegation of each count that the sale was not made pursuant to a written order on a form issued by the Commissioner was sufficient under the statute. The court also held that the indictment was sufficiently definite to apprise petitioner of the charge against him and to operate as a bar to a second conviction for the same offense, and that no miscarriage of justice was shown by the record (R. 276).

The evidence relating to the charges of the counts under which petitioner was convicted may be summarized as follows:

Dezonia, a drug addict (R. 107), had known petitioner for about 25 years (R. 108), and prior to June 1940 had obtained morphine prescriptions from him for $1.00 each (R. 111). On June 1, 1940, Dezonia went from Fulton, Tennessee, where

he was then working (R. 107), to petitioner's office in Union City for the sole purpose of obtaining morphine (R. 108).[3] Petitioner gave him a prescription for 20 one-quarter grain tablets of morphine sulphate, for which Dezonia paid petitioner $1.00 (R. 109; see also R. 84). Again on June 3, 4, 5, 6, 7, 8, and 9 Dezonia obtained prescriptions from petitioner for identical amounts of morphine sulphate, paying petitioner $1.00 for each prescription (R. 109–111; see also R. 42–43, 84–86). Dezonia had each prescription filled at a drug store the same day it was issued (*ibid.*), and administered the drug to himself with his own hypodermic equipment (R. 109–110).

The druggist reported these prescriptions to the mayor of Union City (R. 86) and on June 9, the date when the last prescription was filled, the mayor took Dezonia into custody as he was leaving the drug store (R. 86–87, 111). An agent of the Bureau of Narcotics was called in and procured a statement from Dezonia. Thereafter, the Bureau conducted an investigation which culminated in the indictment of petitioner (R. 118–122; see also R. 55–69).

During the period that he obtained the prescriptions from petitioner, Dezonia was not suffering from any disease other than drug addiction

[3] Dezonia was unable to get morphine in Fulton because his family had induced the doctors and druggists there not to issue and fill prescriptions for him (R. 111).

(R. 108, 109, 115).[4] This was such that when he was "on" the drug he would suffer if deprived of it, but would not become desperate or unable to look after his business (R. 113). When he went to petitioner on June 1, 1940, he was suffering the characteristic pains of an addict deprived of drugs and he so advised petitioner (R. 115, 116). When he obtained morphine every day he suffered no pain (R. 115).

Petitioner admitted that he knew Dezonia was an addict (R. 161, 169) and that he did not prescribe the morphine with the object of treating or curing the disease (R. 171–172). He had, in fact, never given Dezonia any medicine or treatment other than his morphine "requirements" (R. 196–197; see also R. 111). Petitioner's explanation of his actions was that he felt "compassion" for Dezonia and gave him morphine to relieve the suffering that accompanies deprivation and to sustain Dezonia so that he could work (R. 161–162, 171–172, 197). He also said that whenever Dezonia came to him he knew Dezonia needed the drug (R. 172) and that he knew Dezonia's "condition and requirements" (R. 161).

Despite this knowledge petitioner noted on the prescriptions that the drug was "for enteritis" or "for sciatica." He also entered directions for

[4] Though Dezonia had sinus trouble (R. 108, 109), he was not affected by it at this time (R. 115), and petitioner had never treated him for it (R. 196–197).

self-administration "as needed" or at specified intervals of time (R. 42–43, 84–86). Though he stated at one point on cross-examination that Dezonia had enteritis and sciatica (R. 198), he did not claim that he was treating Dezonia for these or any other ailments or that he prescribed the morphine for purposes of treatment (see R. 161–162, 171–172, 196–197, 198–199, 199–200). On the contrary he admitted that he gave Dezonia "only his requirements of morphine" (R. 197). When asked why he did not write "drug addiction" on the prescriptions, petitioner said that he never did so (R. 198–199). Dezonia did not have either sciatica or enteritis, nor did he tell petitioner the contrary (R. 108–110, 115).

There was, in addition, expert medical testimony that it was bad medical practice and not treatment to deliver daily to an addict for self-administration the amount of morphine required to keep him comfortable,[5] and that proper treatment calls for

[5] Though petitioner claims (Pet. 12–13, 17) that expert witnesses in his behalf testified to the contrary (R. 235, 239), their testimony was so qualified as to present no substantial conflict (see R. 235, 237, 239, 243–244, 248–249). One of these doctors had no experience in treating addicts (R. 238) and the other, Dr. Fitts, who had prescribed morphine for Dezonia on prior occasions (R. 240), admitted that he had not given it in the amounts and for the length of time that petitioner had (R. 243) and that he did not consider Dezonia a patient (R. 248). He also testified that he would not prescribe for an addict indefinitely (R. 244, 247–248) and that he would not regard as a patient one who is given a large amount of narcotics daily (R. 248). Such a person, he said, needs institutional care (R. 241, 244, 248).

reduction of the dosage and institutional care (R. 128, 132, 135–136, 142–143).

ARGUMENT

Petitioner contends, in substance, first, that the indictment does not charge an offense under the statute; and, secondly, that the evidence does not show a violation of the statute, or, if it does, that the statute is unconstitutional. Since these contentions admittedly were raised for the first time on petition for rehearing in the court below and since no exceptional circumstance is shown, they are of the kind ordinarily not considered as grounds for reversal of the verdict of the jury. *United States* v. *Atkinson*, 297 U. S. 157. Application of this rule would seem particularly appropriate in the present case since petitioner's contentions do not go to the fairness of the conduct of the proceeding. His objections to the indictment are of a technical character, and likewise, the construction of the statute urged in his second contention, if correct, might have been charged to the jury if a request had been made.

I

A. Petitioner assails the indictment principally upon the ground that it alleges that the sales were not made in pursuance of written orders of the purchaser on forms "issued in blank for that purpose by the Commissioner of Internal Revenue"

(see, e. g., R. 16), whereas the statute prohibits sales not in pursuance of written orders on forms "issued in blank for that purpose by the Secretary" of the Treasury (I. R. C., § 2554 (a), *supra,* pp. 2–3). He argues that this difference is fatal, as was true of the comparable difference in *Fleisher* v. *United States,* 302 U. S. 218, because (1) the Secretary has no statutory power to delegate the authority to issue such forms to the Commissioner of Internal Revenue, but only to the Commissioner of Narcotics; (2) the Secretary has delegated that authority to the Commissioner of Narcotics and not to the Commissioner of Internal Revenue; and (3) in any event, the delegation to the Secretary of authority to empower a subordinate to issue forms is an unconstitutional delegation of legislative power. (Pet. 7–9, 14–15, 31–35.) None of these contentions has merit.

(1) The Secretary has statutory authority to delegate to the Commissioner of Internal Revenue the function of issuing order forms. The first sentence of Section 2 of the original Harrison Narcotic Act of December 17, 1914 (38 Stat. 785, 786) read substantially as does the present Section 2554 (a) of the Internal Revenue Code, except that it required that the form was "to be issued in blank for that purpose by the Commissioner of Internal Revenue." The Act of March 3, 1927 (44 Stat. 1381), created the Bureau of Prohibition

in the Treasury Department. Section 4 (a) of that act (Appendix, *infra*, p. 22) transferred to the Secretary of the Treasury "The rights, privileges, powers, and duties conferred or imposed upon the Commissioner of Internal Revenue * * * by any law in respect of the taxation, importation, exportation, transportation, manufacture, production, compounding, sale, exchange, dispensing, giving away, possession, or use of beverages, intoxicating liquors, or narcotic drugs." Section 4 (b) (Appendix, *infra*, p. 22) authorized the Secretary to confer any of such powers and duties upon the Commissioner of Prohibition, but also authorized him "to confer or impose upon the Commissioner of Internal Revenue * * * any of such rights, privileges, powers, and duties, which, in the opinion of the Secretary, may be necessary in connection with internal revenue taxes."

The Act of June 14, 1930 (46 Stat. 585) established the Bureau of Narcotics and in Section 3 (b) (Appendix, *infra*, p. 23) authorized the Secretary of the Treasury to confer upon the Commissioner of Narcotics "any of the rights, privileges, powers, and duties in respect of narcotic drugs enumerated in" Section 4 (a) of the Act of March 3, 1927. It is upon this provision that petitioner pitches his contention that the Secretary is not authorized to delegate to the Commissioner of Internal Revenue the power to issue order forms (Pet. 34–35). However, the Secretary's power under Section 4

(b) of the Act of March 3, 1927, to delegate to the Commissioner of Internal Revenue his powers and duties in connection with taxes on narcotics was left unimpaired, and was in turn incorporated in the Internal Revenue Code as Section 2606, which provides:

> The Secretary is authorized to confer or impose any of the rights, privileges, powers, and duties in respect of narcotic drugs conferred upon him by subchapters A and B of this chapter and part V of subchapter A of chapter 27 upon the Commissioner of Narcotics, or any officer or employee of the Bureau of Narcotics, and to confer or impose upon the Commissioner of Internal Revenue, or any of the officers or employees of the Bureau of Internal Revenue, any of such rights, privileges, powers, and duties which, in the opinion of the Secretary, may be necessary in connection with internal revenue taxes.

It is clear, therefore, that between 1927 and 1930 the Secretary was authorized to delegate his powers and duties incident to the administration of laws relating to narcotics to the Commissioner of Prohibition, and after 1930 to the Commissioner of Narcotics. It is equally plain that at all times since the passage of the Act of March 3, 1927, the Secretary has had authority to confer upon the Commissioner of Internal Revenue his powers and duties connected with the administration and collection of internal-revenue taxes on

narcotic drugs. The issuance of order forms facilitates the enforcement of the taxing provisions of the statute. Cf. *United States* v. *Doremus,* 249 U. S. 86, 94–95; *Nigro* v. *United States,* 276 U. S. 332, 345–346. Therefore, the Secretary's authority to delegate to the Commissioner of Internal Revenue his powers and duties "in connection with internal revenue taxes" comprehends authority to delegate the power to issue order forms.

(2) The Secretary has delegated authority to issue forms to the Commissioner of Internal Revenue. In Treasury Decision No. 3999 (Appendix, *infra,* p. 23), issued on March 18, 1927, the Secretary set up the Bureau of Prohibition and, pursuant to his authority under Section 4 (b) of the Act of March 3, 1927 (*supra,* p. 11), ordered that the "Commissioner of Internal Revenue will *issue* * * * all internal-revenue stamps of every class pertaining to * * * narcotics, including narcotic order forms." [Italics supplied.] On April 1, 1927, the Secretary, pursuant to his powers under Section 4 (b) of the Act of March 3, 1927, issued Treasury Decision 1 (Appendix, *infra,* p. 24), which conferred upon the Commissioner of Prohibition specified powers and duties relating to the administration of the Harrison Narcotic Act which previously had been exercised by the Commissioner of Internal Revenue, but which were transferred to the Secretary by Section 4 (a) of

the Act of March 3, 1927. Among the powers so conferred upon the Commissioner of Prohibition was "The *prescribing* of forms and order forms under any of the above acts." [Italics supplied.] However, Section VIII of this decision delegated to the Commissioner of Internal Revenue various rights, privileges, powers and duties of the latter which were transferred to the Secretary by Section 4 (a) of the Act of March 3, 1927, including those "relating to internal-revenue taxes" not involving violations of laws under the Eighteenth Amendment. Thus, while the duty to *prescribe* forms was delegated to the Commissioner of Prohibition, the authority to *issue* forms conferred on the Commissioner of Internal Revenue by Treasury Decision No. 3999 was confirmed in the general delegation of authority to the Commissioner of Internal Revenue contained in Section VIII of Treasury Decision 1.

Treasury Decision 2 (Appendix, *infra,* p. 25), issued July 1, 1930, and based upon Section 3 (b) of the Act of June 14 of that year and upon Section 4 (b) of the Act of March 3, 1927, transferred the specific powers and duties of the Commissioner of Prohibition relating to narcotic drugs to the Commissioner of Narcotics. It also continued the delegation made to the Commissioner of Internal Revenue by Treasury Decision 1. The delegation of powers and duties authorized by Section 2606 of the Internal Revenue Code (*supra,* p. 12) was accom-

plished by Treasury Decision No. 4884 (Appendix, *infra,* p. 26), issued on February 11, 1939. This decision made applicable to the provisions of the code all prior decisions and regulations issued under laws which were superseded by the code.

This series of administrative regulations makes clear that the authority to issue order forms originally conferred by the Harrison Narcotic Act upon the Commissioner of Internal Revenue and transferred to the Secretary by the Act of March 3, 1927, has, since the promulgation of Treasury Decision No. 3999 on March 18, 1927, been vested by the Secretary in the Commissioner. We are advised by the Treasury Department that it has given its regulations this construction, and that pursuant to them the Commissioner has always exercised the function of issuing forms. This official interpretation and practice is entitled to weight. Cf. *Norwegian Nitrogen Products Co.* v. *United States,* 288 U. S. 294, 315; *United States* v. *American Trucking Associations,* 310 U. S. 534, 539.

(3) The delegation to the Secretary of the power to authorize the Commissioner of Internal Revenue to issue order forms is not an unconstitutional delegation of legislative power, as petitioner contends (Pet. 7–8, 9, 14–15). Section 2554 (a) of the Internal Revenue Code (*supra,* p. 2) explicitly defines the Congressional policy that sales may be made only pursuant to order forms and that a sale not so made shall be an offense. The

function of issuing such forms is a mere detail in the effectuation and administration of that policy which Congress may authorize the Secretary to delegate to a subordinate. See *Whitcombe* v. *United States*, 90 F. (2d) 290, 293 (C. C. A. 3), certiorari denied, 302 U. S. 759; *Czarnecki* v. *United States*, 95 F. (2d) 32, 33–35 (C. C. A. 3); *United States* v. *Dibella*, 28 F. (2d) 805, 806 (C. C. A. 2), certiorari denied, 278 U. S. 658. Cf. *United States* v. *Grimaud*, 220 U. S. 506.

B. Petitioner contends (Pet. 7, 30–31) that the indictment is fatally defective in not designating the purchaser of the drugs alleged to have been sold, and in failing to allege that petitioner issued the prescriptions by means of which the sales were made.[7] However, each count alleges that on or

[7] Petitioner also argues that the allegation in the indictment that he was a "physician dispenser" is, under *Young* v. *United States*, No. 86, this Term, decided February 2, 1942, equivalent to an allegation that he was a vendor and not a practicing physician, and that, since there was no evidence that he filled any prescriptions or directly sold narcotics, he was convicted of a crime not charged (Pet. 18, 30). The indictment, however, charged petitioner with sales by means of purported prescriptions not in the course of his professional practice only, and it is settled that such allegations charge an offense under the statute. *Jin Fuey Moy* v. *United States*, 254 U. S. 189, 192; see also *Linder* v. *United States*, 268 U. S. 5, 18, 19–22; *United States* v. *Behrman*, 258 U. S. 280, 287; *Webb* v. *United States*, 249 U. S. 96, 99. Read in its context the term "physician dispenser" used in the indictment is merely an occupational description of petitioner as a physician dispensing narcotics. Such use of the term is consistent with the holding in the *Young* case where

about a specified date petitioner, "at Union City, Obion County, Tennessee, * * * a physician dispenser in opium, morphine, * * * did * * * sell * * * approximately five (5) grains of morphine sulphate, * * * the said sale * * * being accomplished by means of a purported prescription dated June * * * 1940, for Harry Dezonia, calling for the amount of morphine sulphate set out above" (R. 16–25). Fairly read, this clearly means that petitioner issued the prescriptions and that Dezonia was the purchaser. The record contains no indication that petitioner had any doubt as to this meaning at the trial, and he cannot show that the alleged defects in any way prejudiced his defense. They were at most formal in nature and may not now be urged as grounds for reversal. 18 U. S. C. 556; *Hagner* v. *United States,* 285 U. S. 427, 430–433; *United States* v. *Behrman,* 258 U. S. 280, 288; *United States* v. *Goldsmith,* 108 F. (2d) 917, 920–921 (C. C. A. 2), certiorari denied, 309 U. S. 678.[8]

---

this Court said that "The word 'dispense' is evidently used in Section 2 (a) [I. R. C., § 2554 (c) (1)] in a sense broad enough to include personal administration of drugs by an attending doctor."

[8] In *Miller* v. *United States,* 288 Fed. 816 (C. C. A. 5), cited by petitioner (Pet. 30), the indictment failed to specify the place at which the sale was made, as well as the purchaser, and was not sufficiently specific to distinguish the sale charged from several other sales made on the same date.

II

Petitioner contends that the "undisputed evidence" does not establish a violation of the statute and that if the statute is construed as applicable to his conduct it constitutes a regulation of the practice of medicine in violation of the Tenth Amendment (Pet. 9–13, 15–16, 23, 36–39, 45). He also argues that the statute permits a physician to prescribe narcotics in treating an addict in the course of his professional practice, but does not establish standards for measuring the quantities which may be prescribed. He asserts that the statute is, therefore, indefinite because it leaves the question of the physician's good faith to be determined by the jury upon a choice between conflicting opinions of medical experts as to what constitutes proper practice (Pet. 9–10, 13, 17, 24, 37–39, 47–58).

These contentions are grounded upon petitioner's version of the evidence that his conduct was in good faith in the course of his professional practice only. This, however, was a question of fact for the jury (*Linder* v. *United States,* 268 U. S. 5, 18), and its verdict against petitioner is fully supported by the evidence summarized in the Statement (*supra,* pp. 5–9), which shows that no *bona fide* physician-patient relationship existed between petitioner and Dezonia.

Petitioner never gave Dezonia any medicine or treatment other than morphine. Dezonia's only affliction was that he was an addict and there is

no evidence or contention that petitioner attempted to cure his addiction. It was Dezonia's appetite, not the professional judgment of petitioner, that determined when and in what quantities the drug would be provided. Petitioner accepted Dezonia's request as sufficient proof that a prescription should be issued, and petitioner never hesitated to issue a prescription with the false notation "for enteritis" or "for sciatica" when Dezonia came to him. Thus, while it may be conceded that Dezonia was suffering pain when he went to petitioner, and that the morphine prescribed by petitioner relieved him, there were other circumstances from which the jury was justified in concluding that petitioner was not acting in good faith and in the course of his professional practice only.

In *Linder* v. *United States,* 268 U. S. 5, upon which petitioner chiefly relies, the indictment, unlike that here, did not question the defendant's good faith or allege that the dispensation of the drugs was not in the course of professional practice, and the facts disclosed no conscious design to violate the law (268 U. S., at 17).[9] Though it was held in that case that a physician may, if he acts

[9] It should be noted, too, that the amount of drugs prescribed in the *Linder* case was one tablet of morphine and three tablets of cocaine (268 U. S., at 11), whereas here petitioner gave Dezonia 160 one-quarter grain tablets of morphine sulphate over a period of nine days (*supra*, p. 6). Cf. *Boyd* v. *United States*, 271 U. S. 104, 105.

bona fide, give an addict moderate amounts of drugs for self-administration in order to relieve conditions incident to addiction (268 U. S., at 22), the decision makes clear that the good faith of the physician is the determinative issue of fact (268 U. S., at 18). See also *Boyd* v. *United States,* 271 U. S. 104, 105–106; *Heller* v. *United States,* 104 F. (2d) 446, 447–448 (C. C. A. 4); *Hawkins* v. *United States,* 90 F. (2d) 551, 554–555 (C. C. A. 5), certiorari denied, 302 U. S. 733. Here the jury must be understood to have determined that issue against petitioner,[10] and its verdict was approved by the trial court upon motion for a new trial, and by the court below.

Since the jury found against petitioner on the issue of *bona fide* professional practice, no question of the validity of the statute as a regulation of the practice of medicine is involved. *Linder* v. *United States, supra;* see also *Boyd* v. *United States, supra.* Petitioner's contention that the statute, as applied to physicians, is void for indefiniteness is equally unavailing. The require-

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[10] The trial court's charge to the jury is not included in the bill of exceptions, and the bill expressly states that there were no exceptions to the charge and no special requests for instructions (R. 253). It must therefore be assumed that the court fully and correctly instructed the jury upon the law of the case. Cf. *Hall* v. *United States,* 48 F. (2d) 66, 68 (C. C. A. 9); *Kanner* v. *United States,* 34 F. (2d) 863, 867 (C. C. A. 7); *Brown* v. *United States,* 32 F. (2d) 953, 954 (App. D. C.); *Harrod* v. *United States,* 29 F. (2d) 454, 455 (App. D. C.).

ment of the physicians' exemption that narcotics may be dispensed or distributed to a "patient * * * in the course of * * * professional practice only" is sufficiently definite to apprise the professional of prohibited activities. *Gorin* v. *United States,* 312 U. S. 19, 27–28; *Connally* v. *General Construction Co.,* 269 U. S. 385, 391.

CONCLUSION

The case was correctly decided below and there is no conflict of decisions. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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APRIL 1942.

APPENDIX

A. The Relevant Statutory Provisions

Section 4 (a) and (b) of the Act of March 3, 1927 (44 Stat. 1381, 1382):

> (a) [5 U. S. C. 281c] The rights, privileges, powers, and duties conferred or imposed upon the Commissioner of Internal Revenue and his assistants, agents, and inspectors, by any law in respect of the taxaton, importation, exportation, transportation, manufacture, production, compounding, sale, exchange, dispensing, giving away, possession, or use of beverages, intoxicating liquors, or narcotic drugs, or by the National Prohibition Act, as amended, or any other law relating to the enforcement of the eighteenth amendment, are hereby transferred to, and conferred and imposed upon, the Secretary of the Treasury.
>
> (b) The Secretary of the Treasury is authorized to confer or impose any of such rights, privileges, powers, and duties upon the Commissioner of Prohibition, or any of the officers or employees of the Bureau of Prohibition, and to confer or impose upon the Commissioner of Internal Revenue, or any of the officers or employees of the Bureau of Internal Revenue, any of such rights, privileges, powers, and duties which, in the opinion of the Secretary, may be necessary in connection with internal revenue taxes.[1]

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[1] Subsection (b) has since been incorporated in Section 2606 of the Internal Revenue Code (*supra*, p. 12).

Section 3 (b) of the Act of June 14, 1930 (46 Stat. 585, 586; 5 U. S. C. 282b (b)):

> The Secretary of the Treasury is authorized to confer or impose any of the rights, privileges, powers, and duties in respect of narcotic drugs enumerated in subdivision (a) of section 4 of the Act entitled "An Act to create a Bureau of Customs and a Bureau of Prohibition in the Department of the Treasury," approved March 3, 1927 (U. S. C., title 5, sec. 281c), upon the Commissioner of Narcotics, or any officer or employee of the Bureau of Narcotics.

B. The Treasury Decisions and Administrative Regulations

The pertinent sections of Treasury Decision 3999 (29 Treasury Decisions, Internal Revenue, 106), issued on March 18, 1927, provide:

> Pursuant to the provisions of the Act of Congress approved March 3, 1927 (Public, No. 751), and in the exercise of authority conferred upon me by that law, there is promulgated hereinafter for the information and guidance of all concerned, the following, to wit:
>
> 1. Effective April 1, 1927, there is hereby created in the Department of the Treasury a bureau to be known as the Bureau of Prohibition.
>
> * * * * *
>
> INTERNAL-REVENUE STAMPS
>
> The Commissioner of Internal Revenue will issue to the various collectors of internal revenue all internal-revenue stamps of every class pertaining to spirits, wines, malt

liquors, and narcotics, including narcotic order forms, and the collectors of internal revenue will account to the Commissioner of Internal Revenue for the same. The authority to redeem stamps shall rest with the Commissioner of Internal Revenue.

The pertinent sections of Treasury Decision 1 (Treasury Department, Bureau of Narcotics, Regulations No. 5; 3 Fox, *Internal Revenue Regulations*) issued on April 1, 1927, provide:

VI. RIGHTS, PRIVILEGES, POWERS, AND DUTIES CONFERRED AND IMPOSED ON THE COMMISSIONER OF PROHIBITION RELATING TO NARCOTIC DRUGS

(1) There are hereby conferred and imposed upon the Commissioner of Prohibition, subject to the general supervision and direction of the Secretary of the Treasury, all the rights, privileges, powers, and duties conferred or imposed upon the Commissioner of Internal Revenue (and which are transferred to and conferred and imposed upon the Secretary of the Treasury by subdivision (a) of section 4 of the above act of March 3, 1927) by the Harrison Narcotic Act, as amended, or by the act entitled "An Act regulating the manufacture of smoking opium within the United States and for other purposes," approved January 17, 1914, in so far as such rights, privileges, powers, and duties relate to—

* * * * *

(d) The prescribing of forms and order forms under any of the above acts;

* * * * *

VIII. RIGHTS, PRIVILEGES, POWERS, AND DUTIES CONFERRED AND IMPOSED UPON THE COMMISSIONER OF INTERNAL REVENUE

There are hereby conferred and imposed upon the Commissioner of Internal Revenue all the rights, privileges, powers, and duties conferred or imposed upon such officer (and which are transferred to and conferred and imposed upon the Secretary of the Treasury by subdivision (a) of section 4 of the above act of March 3, 1927) by any law, except the rights, privileges, powers and duties conferred or imposed upon any other person by Section IV, V, VI, or VII of this order, but not excepting rights, privileges, powers, and duties relating to internal-revenue taxes where no violation of a law relating to the enforcement of the eighteenth amendment is involved. All regulations and changes in regulations shall be subject to the approval of the Secretary of the Treasury.

The pertinent provisions of Treasury Decision 2 (Treasury Department, Bureau of Narcotics, Regulations No. 5; 3 Fox, *Internal Revenue Regulations*), issued on July 1, 1930, provide:

III. RIGHTS, PRIVILEGES, POWERS, AND DUTIES CONFERRED AND IMPOSED UPON THE COMMISSIONER OF NARCOTICS

(1) There are hereby conferred and imposed upon the Commissioner of Narcotics, subject to the general supervision and direction of the Secretary of the Treasury, all the rights, privileges, powers, and duties conferred or imposed upon the Commissioner of Internal Revenue (and which are transferred to and conferred and imposed

upon the Secretary of the Treasury by subdivision (a) of section 4 of the act of March 3, 1927) by the act of December 17, 1914, as amended, known as the Harrison Narcotic Law, or by the act entitled "An Act regulating the manufacture of smoking opium within the United States and for other purposes," approved January 17, 1914, in so far as such rights, privileges, powers, and duties relate to—

* * * * *

(d) The prescribing of forms and order forms under any of the above acts;

* * * * *

V. RIGHTS, PRIVILEGES, POWERS, AND DUTIES CONFERRED AND IMPOSED UPON THE COMMISSIONER OF INTERNAL REVENUE

There are hereby conferred upon the Commissioner of Internal Revenue all the rights, privileges, powers, and duties conferred or imposed upon such officer (and which are transferred to and conferred and imposed upon the Secretary of the Treasury by subdivision (a) of section 4 of the act of March 3, 1927) by any narcotic law, except such rights, privileges, powers, and duties as are hereinbefore conferred or imposed upon the Commissioner of Narcotics.

Treasury Decision 4884 (35 Treasury Decisions, Internal Revenue, 40), issued on February 11, 1939, provides:

All regulations (including all Treasury decisions), prescribed by, or under authority duly delegated by, the Secretary of the Treasury, applicable under any provision of law on the date of the enactment of the internal-revenue code, to the extent such provision of law is superseded by the code,

are hereby prescribed under, and made applicable to, the provisions of the code corresponding to the provision of law so superseded, insofar as any such regulation is not inconsistent with the code.

These regulations are issued under authority of the provisions of sections 1928, 2559 and 2606 of the internal-revenue code and under such other provisions of the code as correspond with the several provisions of law under which any regulation or Treasury decision hereby prescribed and made applicable was issued.

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(3)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

W. A. HAILLING,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

No. 1042

SUPPLEMENTAL AND REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

L. E. GWIEN,
Attorney for Petitioner.

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MAY IT PLEASE THE COURT:

The brief for the Government, opposing the petition for certiorari herein, does not fairly meet the issues presented by the petition. It rests its argument in technicalities and conclusions that disregard material undisputed evidence.

Our reply thereto, involving a further consideration of departmental regulations and material facts, will be supplemented by a presentation of matters deemed relevant in emphasizing the general importance of the questions actually raised by the petition, these, broadly stated, being:

A. Whether the indictment states an offense under Section 2554 of the Internal Revenue Code.

B. Whether the conviction of petitioner rests upon an arbitrary and unconstitutional application of Section 2554 of the Internal Revenue Code.

These will be considered in the order stated.

(A)

The brief for the Government at page 10 thereof apparently concedes that under the authority of Fleisher vs. United States, 302 U. S. 318 the indictment herein is fatally defective if its validity is to be determined alone by the provisions of the applicable statute (I. R. C. Sec. 2554). But it defends the validity of the indictment on the grounds that the statutory requirement with respect to order forms has been changed by Treasury Decisions and Regulations, made under authority delegated by statute, and that such delegation of authority was a valid exercise of legislative power (Gov't Br., pp. 1-16).

The indictment, however, does not charge a violation of Treasury Regulations but the violation of a statute, and in that situation it would seem that its validity should be determined by the provisions of the statute as written. Counsel for the accused in preparing his defense should be able to determine whether the indictment states an offense under the applicable statute by comparing the indictment with the statute without being required to go further and examine a mass of confusing if not conflicting departmental regulations.

If correct in that view, the Treasury Decisions and Regulations are immaterial. The indictment should either have charged a violation of the statute as written or a violation of regulations that changed its provisions.

But the government contention that the Secretary of the Treasury has conferred on the Commissioner of Internal Revenue the power to issue order forms rests upon an interpretation of Treasury Decisions and Regulations so extremely technical that such contention may aptly be designated as a process of hair-splitting.

That interpretation, in substance, rests upon a fine distinction which government counsel make between the word "prescribed," used in the applicable treasury decisions, and the word "issued," appearing in the statute, as these relate to order forms. On the basis of that distinction they contend that Treasury Decision No. 2 (set out at pages 52-55 of our original brief) distributes the statutory powers of the Secretary of the Treasury with respect to order forms between the Commissioner of Narcotics and the Commissioner of Internal Revenue so that the former is charged with the duty of *prescribing* and the latter with the duty of *issuing* such forms. The "prescribing of forms and order forms under any of the above acts," is among the duties and powers conferred on the Commissioner of Narcotics by Section III of Treasury Decision No. 2 but no mention of such forms is made in Section V thereof which is a blanket authorization to the Commissioner of Internal Revenue to exercise powers not conferred on the Commissioner of Narcotics by Sections III and IV of the Treasury Decision.

Irrespective of the right of the Secretary thus to distribute his powers with respect to order forms between the Commissioner of Narcotics and the Commissioner of Internal Revenue, it is respectfully insisted that no such distribution of power was made in the Treasury Decision under consideration.

"Issued" as defined by Webster's New International Dictionary means "to send out officially; to deliver by authority; to publish or utter; to put in circulation; to emit."

"Prescribed," as defined by the same authority, means "to lay down authoritatively as a guide, direction or rule of action; to impose as a peremptory order; to dictate; appoint; ordain."

But the precise definition of the two words, and nice distinctions that might be drawn in the use thereof, are not material in refuting the Government contention. The word "issued" as used in the statute is inclusive and exclusive of the power of the Secretary with respect to order forms and while the word "issue" ordinarily means to put in circulation or deliver, it is frequently used in the sense of promulgation. In Re Land of Five Civilized Tribes, 199 F. 811, 820. It was so used in the statute under consideration, and the word "prescribe" as used in the Treasury Decision was clearly intended to vest in the Commissioner of Narcotics the power with respect to order forms conferred upon the Secretary of the Treasury by the statute.

Any doubt that such is the proper construction of the Treasury Decision disappears when an examination is

made of Subsection 2, Section III of the Treasury Decision as set out at page 16 of Regulations No. 5, effective June 1, 1938, issued by the U. S. Treasury Department, Bureau of Narcotics, and Article 67 of these Regulations, setting out the procedure regarding order forms. Subsection 2 and Article 67 are set out in the appendix to this brief.

Section III, Subsection 2, of Treasury Decision No. 2, authorizes the Commissioner of Narcotics to prescribe such Regulations as he may deem necessary in the execution of the functions imposed upon him by that section but restricts the power of the Commissioner of Internal Revenue to participate in the making of regulations to those "*relating to internal-revenue taxes where no violation of the narcotic law is involved.*"

Art. 67, p. 42, Regulations No. 5, Treasury Department, Bureau of Narcotics, provides that order forms shall be "issued" by the collectors. Obviously, the word "issued" is there used in the sense of "delivered," but be that as it may, neither that article nor any other (Art. 68-89) relating to order forms, imposes any duty on the Commissioner of Internal Revenue with respect to the same, and in case of the theft or loss of the order forms the report thereof is not made to the Commissioner of Internal Revenue, but to the Commissioner of Narcotics (Art. 89, p. 47, Regulations No. 5, effective June 3, 1938). The pertinent provisions of that article are set out in the appendix.

The relevant statutory provisions, Section 4(a) and 4(b) of the Act of March 3, 1927 (44 Stat. 1381, 1382), and Section 3(b) of the Act of June 14, 1930 (46 Stat.

585, 586; 5 U. S. C. 282 b), are set out at pages 22, 23 of the appendix to the Government brief.

It will be observed from an inspection of these statutes that Section 4(b) of the Act of March 3, 1927, authorizing a distribution of powers between the Commissioner of Narcotics and the Commissioner of Internal Revenue with respect to narcotics was not incorporated in the Act of June 14, 1930, but Section 3(b) of that act only authorized the Secretary of the Treasury to confer powers vested in him by Section 4(a) of the Act of March 3, 1927, as these related to "narcotic drugs," upon the Commissioner of Narcotics.

The omission of Section 4(b) from the later act did not impair the power of the Secretary to delegate authority to the Commissioner of Internal Revenue with respect to the prohibition laws to which reference was made in Section 4(a) and to that extent it remained in full force and effect but its omission from the act that established the Bureau of Narcotics would seem to have been intended as an end of the power theretofore vested in the Secretary of the Treasury to delegate authority to the Commissioner of Internal Revenue with respect to the narcotic laws and to require that the delegation thereof be restricted to the Commissioner of Narcotics.

True it is that Section 4(b), as it relates to narcotics, has been incorporated in Section 2606 of the Internal Revenue Code, adopted since the promulgation of Treasury Decision No. 2, but the powers thereunder that may be delegated to the Commissioner of Internal Revenue are restricted to "duties which, in the opinion of the Secretary may be necessary in connection with internal

revenue taxes," this being the restriction imposed by Section 4(b) of the Act of March 3, 1927.

The Harrison Act is a "registration and taxing act" (U. S. vs. Jin Fuey Moy, 241 U. S. 394), but Section 4(a) of the Act of March 3, 1927 (5 U. S. C. 281c), reciting the powers that may be delegated under 5 U. S. C. 282 (b), for purposes of administration separates "*taxation*" from the "sale, dispensing, giving away," etc., of narcotics, and this classification is clearly recognized by Section 2606 of the Internal Revenue Code.

Treasury Decision No. 2, considered as a whole, apparently recognizes the statutory limitation for which we contend, but be that as it may, it clearly confers all the powers of the Secretary of the Treasury with respect to order forms that lawfully could be delegated to any official upon the Commissioner of Narcotics, and not upon the Commissioner of Internal Revenue. An examination of the power to *prescribe* order forms, specifically conferred by Section III of Treasury Decision No. 2, with other specific powers and duties conferred on that official by subsection 1(a-j), the exclusion by Subsection 2 of Section III of the Commissioner of Internal Revenue from participating in the making of regulations except those "relating to the collection of internal-revenue taxes where no violation of narcotic laws is involved," and the withdrawal by Section IV of that Decision of powers theretofore exercised by agents of the Commissioner of Internal Revenue, leads inevitably to the conclusion that regardless of powers that could have been conferred on the Commissioner of Internal Revenue complete and exclusive jurisdiction over order forms was vested in the Commissioner of Narcotics by Treasury Decision No. 2.

At page 15 of their brief counsel for the Government state that they are advised by the Treasury Department that it has construed the regulations as conferring authority upon the Commissioner of Internal Revenue to issue order forms, and that such function has always been exercised by that official. But such advice and practice are not consistent with the powers conferred by Treasury Decision No. 2.

Regulations No. 5, to which reference has heretofore been made, issued by the Treasury Department, Bureau of Narcotics, deal with order forms (Articles 67-90) but make no provision for the issuance thereof by the Commissioner of Internal Revenue. That official joined in the promulgation of the regulations, which were approved by the Secretary of the Treasury, but his right to participate in making regulations was expressly restricted by Subsection 2, Section III of Treasury Decision No. 2, to those that relate to "*internal-revenue taxes where no violation of the narcotic laws is involved.*" A violation of the narcotic laws being involved in a sale without order forms, the regulations with respect thereto must be construed as having been made by the Commissioner of Narcotics, the Commissioner of Internal Revenue acquiescing therein, and these, as will appear from an examination of Articles 67 and 89, preclude any finding that the regulations require the order forms to be issued by the Commissioner of Internal Revenue.

At any rate, the regulations and the practice have created a situation so confusing that it should be clarified by a decision of this court.

The indictment in this case followed the stereotyped form of indictment in narcotic prosecutions. The explanation of the use of this form is doubtless to be found in the language of the statute as set out in Treasury Regulations No. 5, issued as of June 1, 1938. While purporting to state the law as amended, no reference is made to the changes with respect to order forms, made by legislation passed subsequent to the act of December 17, 1914, but in setting out the statute as then existing (June 1, 1938) these regulations at page 3 and again at page 40 recite the statute as requiring the order form to be issued by the "Commissioner of Internal Revenue."

A prosecutor, relying on the statute as set out in these regulations, would charge a violation of the law as it existed prior to the legislation that changed the provisions of the original act with respect to order forms. This being true, the question raised by the indictment here is one of general importance that should be settled by this court.

(B)

Emphasizing bits and fragments of the evidence, and overlooking material testimony that is not fairly disputable in the record, the statement at pages 3-8 of the brief for the Government so colors the picture actually presented by the evidence as to require a further statement of material facts.

Preliminary to such statement, and without any effort to catalogue the inaccuracies and unsupported conclusions in the statement under consideration, we point out a few matters that justify the assertion above made.

1. At page 5 of their brief, government counsel state that "Dezonia went from Fulton, Tennessee (Fulton is in Kentucky), *where he was then working* (R. 107), to petitioner's office in Union City for the sole purpose of obtaining morphine." But Dezonia, while he made some trips to and from Fulton, about twelve miles from Union City, *was working in Union City and stayed there during the period covered by the prescriptions given him by petitioner* (R. 108), and it appears from undisputed testimony that petitioner when these prescriptions were given advised Dezonia to go to an institution for treatment, informed him that he would only prescribe for him until such time as he could finish his work, this being of a temporary nature, and get out of town. Petitioner was assured by Dezonia that he would enter an institution when that work was completed (R. 162, 163).

2. At page 7 it is stated: "Petitioner admitted that he knew Dezonia was an addict (R. 161, 169) and that he did not prescribe the morphine with the object of treating or curing the disease (R. 171-172)." And at page 8, speaking of petitioner, the brief for the Government further states: "Though he stated at one point on cross-examination that Dezonia had enteritis and sciatica (R. 198), he did not claim that he was treating Dezonia for these or any other ailments or that he prescribed the morphine for purposes of treatment (see R. 161-162, 171-172, 196-197, 198-199, 199-200)." But over and over again petitioner stated that he prescribed for Dezonia on account of his "highly nervous state" and to relieve his "pain and suffering" (R. 161, 162, 197, 198), including the pain he was suffering from sciatica and enteritis (R. 198, 199, 200).

It appears without dispute in the record that morphine is not a curative but a sedative; to relieve pain is the reason why it is prescribed or administered by physicians but the Government tried this case on the theory that prescribing it to relieve the pain of an addict did not constitute treatment of a patient but a sale of drugs; that an addict could not be properly treated outside an institution and at pages 25, 26 of its brief, opposing the petition for a rehearing, filed in the Circuit Court of Appeals, it was emphatically asserted that an addict "cannot be satisfactorily handled or treated outside of an institution," and that treatment elsewhere is not in accord with "recognized medical practice." That brief, of course, is not before this court but at pages 8 and 9 of their brief herein Government counsel adopt substantially the same theory. Such a theory is equivalent to a nullification of the decision of this court in Linder v. United States, 268 U. S. 5.

3. At page 19 of the Government brief it is stated: "It was Dezonia's appetite, not the professional judgment of petitioner, that determined when and in what quantities the drug would be provided." The statement thus quoted is an unsupported assertion and nothing more. It is directly contradicted by petitioner's undisputed testimony that he exercised his own judgment in prescribing for Dezonia and never gave him or any one else all the morphine his craving required (R. 162, 171, 172).

4. At page 8, the brief for the Government emphasizes the testimony of petitioner that he did not write "drug addiction" on narcotic prescriptions written by him and states at page 19 that the Dezonia prescriptions

had the false notation "For enteritis" or "for sciatica" written on them. As to the latter assertion, the sole basis thereof is the testimony of the addict Dezonia, an inmate of a State Institution for the treatment of mental diseases at the time of the trial, attending court under guard, and regarded as a "psychiatric problem" by physicians (R. 249). Dezonia, in all probability, would not have been allowed to testify at all if seasonable objection had been made to the admission of his testimony. It is doubtful whether his diagnosis of his own condition has sufficient probative value to be accepted against the positive testimony of petitioner that Dezonia did have enteritis and sciatica. As to the failure to write "drug addiction" on the prescriptions, and putting thereon some notation or symbol that would cause them to be filled, the explanation thereof is probably to be found in the administrative construction of the narcotic laws that nullifies the interpretation thereof by this court in the Linder case—an administrative interpretation that caused narcotic agents to advise druggists that they could not lawfully fill a prescription issued to an addict (R. 216). At any rate, the false representations of bodily pain, made by decoys acting under the express instruction of federal narcotic agents—a course of fraudulent conduct that is a reproach to any official agency—puts the Government in a situation in this record where it is not in a position to complain of a lack of candor on the part of a physician seeking to alleviate human suffering in the exercise of his apparent legal rights under the law as interpreted by this court in the Linder case.

The Facts Further Considered.

The counts on which convictions were had involved prescriptions issued to Dezonia. The reasons why petitioner prescribed for him for a *limited period* (R. 161, 162, 198-200), and the facts relating to Dezonia's afflictions and the pain he suffered have been recounted in sufficient detail in our original brief herein (Br. pp. 25, 26), but to emphasize petitioner's testimony, not contradicted on this point by any evidence in the record, that he never prescribed morphine for any one except for a limited period (R. 153), and to show that he followed that course in treating Dezonia, we quote from petitioner's testimony as narrated in the record as follows:

> "Frequently, and particularly in June, 1940, the witness advised Dezonia to go to an institution for treatment, and in June, Dezonia showed him a letter from Lexington, Kentucky, arranging for his going in an institution, which he said he was going to do as soon as he finished his Union City contract. Witness believed that the Government had an institution for the treatment of drug addicts.
>
> 'Q. You may state whether or not, on advising him that he should go to an institution, you told him you would only take care of him until such time as he could get out of town?
>
> A. Yes, sir; he is an incurable addict.
>
> Q. He shortly thereafter did go to an institution?
>
> A. Yes, sir.'"
>
> (R. 162, 163)

Whether or not Dezonia's pain was caused by want of drugs and "severe sinus" (R. 114-115) or a combination of these and other causes, it is clear of doubt that he complained of acute pain and was suffering intensely when petitioner prescribed narcotics for him, and that pe-

titioner issued some of these prescriptions, if not all of them (R. 162), without charge to Dezonia, these facts appearing from the latter's own testimony (R. 116).

Counts I-VII of the indictment involved prescriptions issued to Mrs. Charles Anderson (R. 6-13); Counts VII and IX prescriptions issued to J. M. Cooksey (R. 14, 15), and Counts X to XVII prescriptions to Dezonia (R. 16-24).

As appears from the statements and citations at page 49 of our original brief herein with respect to the transactions with Mrs. Anderson and Cooksey, involved in the counts on which petitioner was acquitted, *both Mrs. Anderson and Cooksey either had or claimed to have diseases other than addiction from which they suffered pain when they consulted petitioner and were given prescriptions for narcotics.* Cooksey, to whom two prescriptions were issued, had a swollen leg, and in addition to prescribing morphine for him, petitioner also prescribed an electric bandage and advised an operation (R. 163, 164, 73, 87). Cooksey, used as a decoy by narcotic agents (R. 119), and later arrested on a charge of impersonating a federal official (R. 89) was not used as a witness in either of the trials of petitioner. The woman referred to in Counts I-VII as "Mrs. Charles Anderson" was also a decoy. She testified under the name Louise Maynard (R. 98). She had been convicted for a violation of the federal narcotic laws (R. 101); she was separated from her husband whose name was Oxenheim (R. 99). She registered and lived at Memphis hotels or rooming houses under the name of Mrs. Benrino (R. 100), and also had lived with a gambler named Lamonica to whom she was never married (R. 99). She had frequently

served as a decoy for federal narcotic agents, traveling with them from place to place (R. 70, 81, 82), and they considered her "plenty smart" (R. 79). One of these agents, introducing her to petitioner as his wife (R. 70, 102), prior to such introduction, had instructed her to state to petitioner that she was suffering from neuritis R. 75), and this she did (R. 60). Diagnosing her ailment as menopausal neuritis (R. 152), petitioner in addition to prescribing narcotics then and there gave her a serum injection for that condition and also prescribed hormone tablets for her (R. 154, 155, 102, 60, 61).

As to prescriptions other than those directly involved in the indictment, it appears, as stated at pages 48-49 of our original brief in support of the petition, a statement supported by record citations there given, these prescriptions were issued to persons who were suffering from serious diseases other than addiction, such diseases including syphilis, tuberculosis and cancer.

All prescriptions, involved in this case, were filled by registered druggists in Union City, Tennessee, where petitioner lived and practiced his profession; records thereof were duly kept, these being available for inspection and inspected by narcotic agents (R. 43, 88); prescriptions issued by petitioner in the course of a "successful and extensive" practice of medicine (R. 211, 46, 52, 148, 149) were not excessive as to numbers nor unusual as to quantities prescribed but were in accord with the customary practice of physicians in that community (R. 45, 52, 89, 94); narcotic prescriptions issued by petitioner constituted only an inconsequential part of his professional work, and with respect to the use of narcotics his practice was in line with that followed by many reputable physicians (R. 45, 95, 250, 244).

Dezonia himself testified that "reputable physicians" in many parts of the country gave him prescriptions similar to those given him by petitioner (R. 115, 116).

That petitioner in issuing prescriptions did not go beyond the limit of legitimate practice as recognized by physicians generally is further shown by the testimony with respect to narcotic prescriptions to one Welch, an addict who also had cancer of the stomach, petitioner's prescriptions being for smaller quantities than those prescribed for Welch by other doctors (R. 53, 204). In connection with the prescriptions issued by petitioner to Welch, it is important to note that he refused to prescribe for that addict at all until he had received communications from W. M. Miles, Mayor of Union City, and from the County Judge of the county in which it is located (R. 209-211).

The letter of the County Judge illustrates the dilemma that often confronts a physician, dealing with an addict, and we quote same as follows:

> "Mr. J. W. Welch, a confirmed narcotic addict with whom you are well acquainted, is begging for a prescription.
>
> I have been told he cannot live without it. If you can give him a prescription without compromising yourself, it will be all right with me."
>
> (R. 209, 210)

The letter of Mayor Miles, a brother of the United States Marshal for the Western District of Tennessee, both of whom are shown by the record to have conferred with Dezonia (R. 46, 86, 87, 111), admirably states the

criterion by which the duty of a physician should be measured. We quote therefrom as follows:

> "This man is, of course, so I am told, a seasoned addict, and my judgment as to when and whether a prescription should be given him would not be worth the paper it was written on. It occurs to me that, as a physician of long years of experience, having had a very successful and extensive practice, your own opinion and judgment in the matter should be your sole guide."
>
> (R. 211)

The practice of other physicians, however extensive, does not excuse a violation of the narcotic laws, nor does the opinion of public officials, however honestly it may be entertained, excuse such a violation, but such practice and opinions show the importance to physicians generally and to the public of the questions presented by the petition for certiorari.

In concluding our consideration of the facts, there is one feature of the argument made by the Government to which response should be made. At pages 19 and 20 of their brief, Government counsel contend that the issue of good faith was decided adversely to the contention of petitioner under a charge that must be presumed to have been a full and correct statement of the applicable law. In reply we state, first, that there was no evidence of bad faith in prescribing for Dezonia but at most a mistake of judgment or a difference of opinion as to what constitutes the proper practice in a case like that of Dezonia and therefore no question for the jury; and, second, that the failure then and there properly to instruct the jury when medical experts, introduced by the

Government, testified that the law prohibited a physician from prescribing narcotics for an addict and the failure to limit the evidence of such experts to testimony as to what constitutes a generally recognized or accepted standard for the treatment of addicts, greatly weakens if it does not destroy the presumption that the jury was properly instructed as to the applicable law. In this connection, we state our willingness to stipulate, if such is permissible under the practice of this court, as to the instructions actually given by the court on the points referred to by Government counsel.

SUPPLEMENTAL MATTERS.

In stating or further emphasizing matters of importance which should be considered in determining whether the petition herein should be granted, there are two points, each affecting the general administration of the narcotic laws, and fairly raised by this record, which we bring to the attention of the court.

I.

To Sanction Administrative Practices Herein Shown Would Be In Practical Effect An Amendment of the Federal Narcotic Laws By Judicial Construction Or Evasion.

The statute says nothing about addicts (I. C. R. Sec. 2554 and exceptions thereto.)

Narcotic agents, as shown by undisputed evidence herein, advised druggists that it was unlawful to fill a prescription issued by a physician to an addict (R. 216).

Medical experts, testifying for the Government, stated they would not prescribe narcotics for an addict, regardless of the suffering or consequences of such refusal, because they understood the federal law to prohibit a physician from prescribing narcotics for an addict unless he also had some other disease (R. 134).

The statutory exception under consideration (I. R. C. Sec. 2554, sub sec. C, par. 1), makes no distinction between treatment to relieve pain and that intended to effect a permanent cure, and, as we construe it, does not limit the right of a physician to prescribe or administer narcotics to addicts to such as are under restraint or suffering from some disease in addition to addiction but allows a physician in the exercise of his professional judgment to administer narcotics to alleviate suffering or protect an addict against the consequences of a sudden withdrawal of narcotics used by him.

But be that as it may, the question thus presented, affecting many physicians, and particularly in view of evidence introduced by the government and contentions it makes in this case, is one of sufficient importance to call for a construction and application by this court of the narcotic statute to prescriptions issued by a physician under the circumstances shown by the record in this case.

The perilous uncertainties to physicians, resulting from an administration of the narcotic laws that confines within narrow limits if it does not entirely nullify the rule pronounced by this court in Linder vs. U. S., 268 U. S. 5 has been the subject of Congressional and other

discussions,* and while no hard and fast line may properly be drawn between what constitutes the sale of drugs and the practice of medicine that line may be drawn with sufficient clearness to protect a physician against what seems to be an arbitrary interpretation of the statute by administrative agencies. At any rate, the meaning and scope of the statute should be made sufficiently clear by the construction thereof by this court that an intelligent physician may understand both his rights and his responsibilities under that statute.

II.

Administrative Regulations and Practices Have Created Such Confusion and Uncertainty as to the Scope and Operation of Federal Narcotic Laws that Justice to Physicians Requires a Clarification Thereof by this Court.

Chapter VIII, Art. 167, Regulations No. 5 of the Bureau of Narcotics, effective June 1, 1938, reads as follows:

> "Art. 167. Purpose of issue.—A prescription, in order to be effective in legalizing the possession of unstamped narcotic drugs and eliminating the necessity for use of order forms, must be issued for legitimate medical purposes. The responsibility for the proper prescribing and dispensing of narcotic drugs is upon the practitioner, but a corresponding liability rests with the druggist who fills the prescription. An order purporting to be a prescription issued to an addict or habitual user of narcotics, not in the course of professional treatment but for the purpose of providing the user with narcotics

* "Drug Addicts Are Human Beings" by Henry Smith Williams, M.D., B.Sc., L.L.D. (Published in 1938 by Shaw Publishing Co., Washington, D. C.), including a "Statement of the Narcotic Problem" by Congressman John M. Coffee of Washington; address of Congressman John M. Coffee in the House of Representatives on September 19, 1940.

> sufficient to keep him comfortable by maintaining his customary use, is not a prescription within the meaning and intent of the act; and the person filling such an order, as well as the person issuing it, may be charged with violation of the law." Pages 74-75.

In so far as it defines the rights and responsibilities of physicians the foregoing regulation is about as clear as mud.

What is a "legitimate medical purpose"? Does it include the relief of pain whether resulting from a withdrawal of drugs or from some other cause? Of course, a prescription that is not in the "course of professional treatment" does not bring a physician within the exemption to the statute, but what constitutes "professional treatment" of an addict? Does it include one or more prescriptions of narcotics to an addict to relieve pain incident to addiction or to avoid the consequences of a sudden withdrawal of drugs? The Linder case would seem to require an affirmative answer to these questions, but the regulations and administrative interpretation thereof, as shown by the record in this case, leave the matter in such doubt that a physician, administering or prescribing narcotics for an addict not under restraint, although for a limited time and not in excessive quantities, acts at his peril. Any prescription of narcotics for an addict would keep him "comfortable" pro tempore, but what is meant by "maintaining his customary use" as that term is used in the regulation? And for how long?

CONCLUSION.

In conclusion it is respectfully submitted that the Government brief evades the issues that are fairly presented by the record and that these present questions of general importance that should be settled by this court.

L. E. GWINN,
Attorney for Petitioner.

APPENDIX.

(1) Subsection 2, Section III, Treasury Decision No. 2.

Power is hereby conferred upon the Commissioner of Narcotics to prescribe such regulations as he may deem necessary for the execution of the functions imposed upon him or upon the officers or employees of the Bureau of Narcotics, but all regulations and changes in regulations shall be subject to the approval of the Secretary of the Treasury.

The Commissioner of Internal Revenue and the Commissioner of Narcotics may, if they are of the opinion that the good of the service will be promoted thereby, prescribe regulations relating to internal-revenue taxes where no violation of the narcotic laws is involved, jointly, subject to the approval of the Secretary of the Treasury.

(2) Regulations No. 5, U. S. Treasury Department (Bureau of Narcotics) effective June 1, 1938.

(a) Article 67.

Procedure regarding order forms. Upon receipt of a properly executed requisition, accompanied by a sum sufficient to cover the cost of the order forms desired, the collector will issue the order forms requested. Before issuing the order forms the collector will cause to be shown thereon in a legible and permanent manner the name, address, registry number, and class number or numbers of the person to whom they are supplied, also the date of issuance and his signature or his name and the initials of the issuing employee.

(b) Material portions of Article 89.

Whenever any used or unused order forms are stolen from, or lost (otherwise than in the course of transmission) by, any person registered under the Act, he shall immediately upon discovery of such theft or loss, report the same to the Commissioner of Narcotics, Washington, D. C., stating the serial number of each duplicate and original form stolen or lost. If the theft or loss includes any original orders received from other persons and the registrant is unable to state the serial numbers of such orders, he shall report the date of receipt thereof and the names and addresses of the purchasers. If an entire book of order forms is lost or stolen, and the registrant is unable to stafe the serial numbers of the order forms contained therein, he shall report the theft or loss to the collector from whom such book was purchased, instead of to the Commissioner of Narcotics, and shall report, in lieu of the numbers of the forms contained in such book, the date or approximate date of purchase thereof. Immediately upon receipt of such report the collector shall transmit it to the Commissioner of Narcotics together with advice from his records (Form 679) as to the serial numbers of the forms contained in such book. If any unused order form reported stolen or lost is subsequently recovered or found, the Commissioner of Narcotics shall be notified thereof.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941.

W. A. NAILLING,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

No. 1042.

PETITION FOR REHEARING.

L. E. GWINN,
Attorney for Petitioner.

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PETITION FOR REHEARING.

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT:

Petitioner respectfully asks a rehearing of his application for certiorari in this cause, and on the grounds hereinafter stated.

I.

This Court apparently overlooked the second question presented by the Petition (page 9) and discussed in the third reason assigned for granting the writ (Petition

pages 15, 16). For the convenience of the Court that question is re-stated in the margin.*

As we construe the decision of this Court in *Linder v. United States*, 268 U. S. 5, that question, premised on undisputed facts, should be answered in the negative, that is that there is no violation. But it must be answered in the affirmative if the conviction of Dr. Nailling herein is to be sustained. To answer it affirmatively is to disregard or to overrule the decision in the Linder case as it interprets the applicable narcotic statute with respect to the rights of physicians in prescribing narcotics for an addict.

If the Linder case is still an authoritative interpretation of the narcotic statute therein construed, it should afford protection to a physician, charged with a violation of Section 2554 of the Internal Revenue Code, when the acts for which he was convicted are well within his legal rights as defined by this court in that case. *If it is no longer the law, as administrative practices herein shown would seem to imply, and narcotic agents and government attorneys expressly claim, then it should be expressly overruled or modified and not allowed to operate as a judicial entrapment for physicians who believe that the construction of a federal penal statute by the Supreme Court should prevail over a conflicting interpretation thereof by administrative agents.*

To show that conflict and the consequences thereof in the instant case, reference will be made to undisputed

* (2) Whether or not it is a violation of the federal statute for a physician, consulted by an habitual user of narcotics who is suffering intense pain, to prescribe narcotics for the relief of such suffering, whether caused by addiction alone or that and some other disease, when the quantity prescribed is not in excess of the reasonable requirements of the addict for a period of twenty-four hours and there is no probability that any part thereof will be used, and in point of fact none was used, by any person other than the addict.

testimony in the record, and to show that this is not an isolated case of administrative nullification of rules pronounced by this court, we shall refer to material which the court may notice judicially.

As to the record in this case, it appears from undisputed testimony:

1. A druggist, testifying for the Government, was advised by a Federal Narcotic Agent that the law prohibited the filling of a prescription, issued by a physician to an addict (R. 216).

2. Many physicians refuse to treat addicts at all (R. 134, 139, 238). The basis of such refusal is the belief that the federal law prohibits a physician from prescribing narcotics for an addict who does not suffer from some affliction other than addiction, though the Linder case expressly holds to the contrary, and one of the medical experts, testifying for the Government, believing it would be a violation of federal law for him to do so, stated that he would not prescribe narcotics for an addict although he knew that death would be the consequence of such refusal (R. 134). Dr. McLaurin who thus testified was not only a government witness but had been a government employee (R. 133).

3. With respect to Dezonia, each prescription given him during the limited period for which he was treated by petitioner was for the "*Minimum*" dosage he required for a period of twenty-four hours (R. 176), this being about one-half of the amount he could take (R. 161), and in giving these prescriptions petitioner pursued the course followed by "reputable" physicians generally

when called upon to prescribe narcotics for *Dezonia* (R. 115, 116, 242, 244).

4. Dezonia was not only an "*incurable addict*" (R. 162, 163), but when deprived of the drug became "*upset and desperate*" (R. 239). Petitioner in prescribing for him for a limited period, or until he could complete his work and "get out of town," Dezonia being informed of this limitation and advised to enter a narcotic institution, which he agreed to do (162, 162), followed the identical course pursued by Doctor Fitts, Jackson, Tennessee, likewise a physician of the highest qualifications (R. 238, 239) and also well acquainted with Dezonia (R. 242-245).

5. Not only in the case of Dezonia, prescriptions to that addict being involved in the counts on which petitioner was convicted, but generally the practice of petitioner was in accord with that of other physicians (R. 45, 95, 244, 250). To emphasize this contention, we have set out in the appendix the pertinent testimony of both the witnesses for the government and for the defense on the point under consideration.

On the theory that it is the business of a physician to alleviate pain and suffering of patients as well as to effectuate a cure, and that a course of treatment for a limited period of time that would permit an addict to complete a work in which he was temporarily engaged so that he could then enter a narcotic institution, is a legitimate medical function, the attorney writing this petition would not have hesitated to advise petitioner that he had a perfect legal right under the applicable narcotic statute as construed by the decisions of this court to issue the prescriptions he gave Dezonia, but now he would advise any physician, asking an opinion as to his rights under

the narcotic laws, either to follow the course of Dr. McLaurin and refuse to prescribe for an addict at all or call the nearest narcotic agent and accept without question his interpretation of the statute without regard to any apparent conflict between that agent's interpretation and the opinion of this court in the Linder case.

If the record in this case disclosed an isolated instance of an administrative interpretation of the applicable narcotic statute in direct conflict with the decision of this court in the Linder case, such interpretation inducing many physicians to believe that they were not allowed to prescribe narcotics for an addict who did not suffer from some disease other than addiction, the deplorable consequences to petitioner might not present a question of general importance that would bring this case within the operation of the rule of this court, governing applications for the writ of certiorari.

But such is not the case.

In an address on House Joint Resolutions 642, delivered in the House of Representatives June 14, 1938, by Congressman John M. Coffee of Washington, reference is made to *administrative interpretations* of the narcotic law "*which is alleged to have set at defiance the clear decisions of the Supreme Court,*" the declaration being made with special reference to the holding in the Linder case.

Congressman Coffee's then statement of the narcotic problem constitutes the introduction (pp. XII-XXIII) to a work, entitled "Drug Addicts are Human Beings" by Henry Smith Williams, M.D., B.Sc., LL.D., and pub-

lished by the Shaw Publishing Co., Washington, D. C., in 1938.

"*We pay no attention to the Linder decision,*" is a statement from the witness chair, attributed to a federal narcotic agent at page 201 of that work. We set out in the margin the paragraph in which the above statement appears.*

According to the same work, the repudiation of the Linder decision is not restricted to field agents of the Bureau of Narcotics, but extends to employees of the Department of Justice. At page 201 it is stated that the cogency of that decision was expressly disavowed in the presence of the then Assistant Attorney General Joseph Keenan by a Mr. Fisher, introduced to the author as the "narcotic specialist of the Department of Justice," and at page 208 the author states that in the office of the Attorney General and in the presence of Mr. Keenan this same official stated that the "Linder decision of the Supreme Court (which denied Federal control over the practice of medicine) had been rescinded by later decisions." The paragraphs in which the foregoing statements appear are set out in the appendix.

We have made no investigation to determine the accuracy of the foregoing statements with respect to the repudiation of the Linder case. Similar statements have been made in other publications, having a wide circulation, but these are deemed sufficient to bring to the atten-

* "'We pay no attention to the Linder decision.' Such was the brazen statement, from the witness chair, of a narcotic agent, representing the Government, at the trial of a physician at Seattle, in August, 1936. I mention the date, because the avowal is thus shown to have been made seven months after the Supreme Court, in the A. A. A. decision, had shown that they pay a great deal of attention to that decision—inasmuch as it was quoted, and cited a second time with reiterated emphasis in the famous decision of January 6, 1936."

tion of the court a general unfortunate situation of which the instant case is a concrete illustration.

As to the Linder decision, it was the view at least of some of the Government attorneys, participating in the preparation of briefs filed in this case, that such decision had been to some extent modified by the decision in Boyd v. United States, 271 U. S. 104. As we construe the latter decision, it does not modify in any particular the decision in the Linder case. On the contrary it reaffirms it and clearly recognizes the right of a physician to prescribe narcotics to an addict either "for the purpose of curing disease or relieving suffering" (pages 106, 107 of the opinion).

In the Boyd case the "prescriptions were for quantities many times in excess of what, *according to any fair medical standard* (italics supplied), reasonably could be put into the possession of confirmed addicts, even when treating them for the addiction or endeavoring to relieve them from suffering incident to it" (p. 106 of the opinion).

One of the addicts in the Boyd case was given a single prescription in which the quantity of narcotics prescribed exceeded the total amount in the eight prescriptions issued Dezonia over a ten day period.

No prescription issued Dezonia was in excess of his daily requirement and the evidence expressly so shows (R. 161, 162, 172, 235).

Dezonia personally used all the narcotics prescribed for him by petitioner (R. 109). He had never been known to sell or give to others any portion of narcotics pre-

scribed for him (R. 245). Consequently, a physician who knew Dezonia and limited each prescription to that addict's daily minimum requirement could be reasonably certain that no part of the narcotics prescribed would be disposed of by Dezonia to any other person. A *reasonable probability*, not a bare possibility, is the test established by the Linder case. Measured by that test, petitioner violated no law when he issued the prescriptions to Dezonia. These prescriptions, issued to relieve the intense pain Dezonia suffered, restricted in quantities to his daily minimum requirement, issued under circumstances that precluded any probability of the disposal by Dezonia of any part of the drugs prescribed for him, and issued only for a limited period of time or until Dezonia could complete his temporary work and enter a narcotic institution, which he did, were well within the legal rights of petitioner as defined by the Linder case.

II.

At page 20 of its brief, opposing the petition for certiorari, the Government states that the "good faith of the physician is the determinative issue of fact," and that the jury determined that issue against petitioner. As that statement, although destitute of any fair basis of support in the record, may have been accepted without investigation by this Court, we shall briefly refer to the so-called issue of "good faith" as presented by the record in this case.

Petitioner, a licensed physician under the laws of Tennessee, and as such authorized to administer narcotics to or prescribe them for addicts (Tenn. Code, Secs. 6618-a, 6618-7, 6625, 6627; Friedman v. State, 141 Tenn. 553),

must in the absence of evidence to the contrary be presumed to have acted in good faith.

However, it is not necessary to rely on this presumption, the evidence, as elsewhere shown, affirmatively establishing Dezonia's need of narcotics and that the quantity prescribed was his "minimum" requirement when each prescription was issued.

The criticism, made by Government experts of these prescriptions, rests upon the assumption that petitioner did not have the right to prescribe narcotics for Dezonia at all. One of these experts, Dr. McLaurin, stated that if under the law "a doctor could prescribe for an addict, it would be left up to the doctor as to how much to prescribe." (R. 134.)

Neither the term "addict" nor "good faith" appears in the applicable statute (Sec. 2554, subsection c, paragraph 1, of the Internal Revenue Code), but reading the term "good faith" into that statute would not materially affect the scope of its operation. A mistake of judgment as to the need of a particular patient would not show bad faith nor tend to negative good faith.

Good faith in the use of narcotics by a physician requires neither more nor less than that the quantity prescribed be restricted to the personal needs of the patient and given in the belief that the use thereof will benefit the patient by relieving pain or otherwise improving his condition. That the quantity prescribed for Dezonia was not excessive and that petitioner believed he would benefit therefrom are affirmatively and indisputably established by the evidence (R. 161, 162, 171, 172).

This being true, and in the absence of any evidence to show a reasonable probability that any portion of the narcotics prescribed for Dezonia would be used by any other person, it must be held as a matter of law that petitioner acted in good faith when he issued the prescriptions to that addict.

If it be conceded that within the limits of a revenue act, a physician may not only be required to keep records of all narcotics administered or prescribed (there is no suggestion that such were not kept by petitioner), but also required to conform his practice to generally accepted or recognized medical standards, such a concession does not aid the Government contention on the issue of good faith.

There is not a scintilla of evidence that petitioner violated any recognized medical standard in issuing the prescriptions to Dezonia. On the contrary, the record shows that reputable physicians, consulted by Dezonia, followed substantially the same course as that pursued by petitioner in issuing the prescriptions involved in the counts on which he was convicted.

There being no evidence of bad faith nor evidence that any act of petitioner was intended to, or calculated to, interfere with the collection of internal revenue, it necessarily follows that his conviction can only be sustained by stretching a revenue act to the breaking point or acquiescing in a *de facto* regulation by the Federal Government of the practice of medicine by physicians licensed by the State of Tennessee. Due regard for constitutional mandates precludes such an acquiescence. Linder v. U. S. 268 U. S. 5; U. S. v. Butler, 297 U. S. 1.

Apparently this court overlooked the point that the conviction herein can only be sustained upon a theory that brings Section 2554 of the Internal Revenue Code in conflict with the 10th Amendment to the Federal Constitution.

Considering the record as a whole, it is obvious that the case was not tried on the theory that the acts of petitioner either directly or indirectly had any tendency to deprive the Government of revenue or to delay, impede, add to the cost of, or in any way affect the collection of revenue.

On the contrary, as a practical proposition, the case was tried on the theory that the statute was a regulation of the practice of medicine. In fact the greater part of the Government's expert testimony related to the proper medical treatment of menopause, cystitis, varicose veins, enteritis, sciatica, etc. (R. 126-132; 136-139; 143).

But that is not all. From the beginning to the end of the trial, both in the examination and cross examination of witnesses, the Government attorney, proceeding on the theory that the trial court was a clinic and jurors medical experts, sought to show:

(1) That narcotic cures could only be effected in an institution and that therefore it was not "professional treatment" to prescribe narcotics for an addict not under restraint; (2) that prescriptions to an addict not intended to effectuate a cure but to alleviate suffering incident to addiction did not come within the scope of the phrase "professional treatments"; (3) that in any case where the addict, regardless of other diseases, was not under restraint it was improper to prescribe narcotics in excess

of the amount necessary for a particular administration or taking of the drug (R. 109, 128, 133, 134, 135, 142, 143, 185, 239, 245).

The expert witnesses were asked as to what constituted "proper practice" in treating addicts (R. 128, 133, 142, 235, 239) these experts differing as to what constitutes such practice, *but there was neither inquiry nor evidence as to fair or generally accepted medical standards.*

There is no warrant in the Federal Narcotics Statutes for conducting a trial thereunder as a Juridical Clinic.

If petitioner's conviction did not result in his punishment for acts not within the scope of any Federal penal statute and that could not be brought within the operation thereof without a violation of the 10th Amendment, the failure of his trial counsel to particularize objections to the procedure followed and to move for a directed verdict might preclude the application of corrective processes by a reviewing court.

Under our system of jurisprudence, however, statutes, creating criminal offenses, are strictly construed, and before any person can be convicted thereunder, his acts must be "plainly and unmistakably within the statute." United States vs. Clark Brewer, 139 U. S. 278. A conviction for acts not included within the statute and that could not be brought within its scope without destroying its constitutionality, is a sheer denial of due process of law. Ex Parte Siebold, 100 U. S., 371, See also Herndon v. Lowry, 301 U. S. 242, 81 L. Ed. 1066.

A conviction for acts that are neither wrongful nor

criminal should not be sanctioned on account of some oversight or omission of counsel. In fact there is respectable authority to support the proposition that a new trial should be granted where the mistake of counsel is so serious that it may have deprived the accused of an important right. People vs. Schulman, 299 Ill. 125, 132 N. E. 530.

But be that as it may, Section 269 of the Judicial Code, so often invoked by the Government as a shield against error committed in its favor, should be so extended as to preclude an affirmance on technicalities.

CONCLUSION.

Petitioner has been successful in the practice of his profession. He is held in highest esteem by men and women in all walks of life (R. 230, 231). His work speaks for itself. For some reason, not disclosed by the record, he, among the physicians of the town where he lives, has been singled out for a narcotic prosecution, this being done although his narcotic prescriptions were in line with those issued by the other doctors in the community.

Preliminary to that prosecution, decoys, including a prostitute, instructed to make false representations as to their physical ailments, were sent to his office by narcotic agents.

But the basis of his conviction was a few prescriptions, issued to an unfortunate addict who was undoubtedly temporarily benefited and in no way injured by these prescriptions, these being issued from humanitarian and not mercenary motives (R. 162, 171, 172), and in the

exercise of what petitioner believed to be his legal rights as defined by the decisions of this court.

Petitioner has almost reached the allotted "three score years and ten." Standing in the evening twilight of his professional career, he seeks a hearing from this court not only to vindicate his professional conduct and avoid serving a prison sentence but also in the interest of the profession to which he belongs.

Many of its members believe, as he believes, that it is not only their right but their professional duty to prescribe narcotics in reasonable quantities for a limited period when necessary to alleviate intense suffering, whether caused by addiction or some other disease, or to prevent the collapse that might follow a sudden withdrawal of the drug from a confirmed addict.

Justice to the members of the medical profession imperatively requires that their rights and responsibilities be defined with reasonable certainty, and so defined that they may know whether it is safe to rely on the construction of a Federal penal statute by this Court that apparently has not been changed by its later decisions.

The publicity, including statements in the National Congress, given to charges that narcotic agents in the administration of the law have nullified the decision of this Court in the Linder case, and the consequences of such publicity as it affects the conduct of physicians, naturally desirous of avoiding the risks and consequences of a Federal prosecution, seems to call for a further construction of the applicable narcotic statute by this Court.

To sustain that faith in the judiciary that is so vital in our system of government, it is imperative that the courts keep faith with individuals whose rights they adjudicate and administer justice, not in accordance with the arbitrary will of any official or governmental agency, but under rules—reasonably clear in their meaning—fixed by law for the control of the citizen and the operation of government. Lynch vs. Klendolph, 204 Iowa, 762, 216 N. W. 2; United States vs. Pardue, 294 Fed. 543, 548).

Invoking the principle thus stated, petitioner respectfully requests that this Court reconsider its denial of the application for certiorari and grant the writ therefor as prayed in his original petition.

L. E. GWINN,
Attorney for Petitioner.

I, the undersigned L. E. Gwinn, attorney for the petitioner, do hereby certify that the foregoing petition for a rehearing is filed in good faith, and not for delay.

L. E. GWINN.

APPENDIX.

I.

Testimony of Druggists.

Pharmacists and druggists, residing at Union City, Tennessee, where Dr. W. A. Nailling, convicted of a violation of the Federal Narcotic laws, owned and operated a hospital and practiced his profession, testified on the trial of the case, and we hereinafter quote extracts from their testimony as the same appears in the record.

GOVERNMENT WITNESSES.

(1) Extract from the testimony of ARTHUR M. HOLMES, a graduate pharmacist and an employee of the Mayes Drug Store, located at Union City, Tennessee:

> "Witness stated that he had been a pharmacist in Union City for three and one-half years at the Mayes Drug Store, during which period of time he had filled quite a number of prescriptions for all the doctors in Union City, including Dr. Nailling, among which were quite a number of prescriptions calling for five grains of morphine sulphate, issued by the doctors of Union City. There was nothing unusual in the prescriptions which were issued by Dr. Nailling. They were not out of line with the prescriptions being filled for other doctors. Did not remember who first inspected the file of prescriptions, but two narcotic agents last summer did do so, after the filling of the prescriptions for Cooksey and Dezonia." (R. 45).

(2) Extracts from the testimony of O. J. TATUM, a retail druggist at Union City, Tennessee:

> " 'Q. At the time this so-called Mr. Anderson pre-

sented you these prescriptions issued by Dr. Nailling, there was nothing irregular or unusual about that from your standpoint?

A. Just regular prescriptions.' (R. p. 44.)

Witness had known Dr. Nailling ever since he had been in Union City; knew that he operated a hospital; performed quite a bit of surgery, and had an extensive practice. Witness learned the true identity of the party who presented the prescriptions next to the last time he came to his store, and thereafter Mr. Reinert went through his files for a period of several hours, and later, Mr. Reinert and Mr. Hoke, Narcotic Inspectors, looked over all the narcotic prescriptions, but took with them only those issued by Dr. Nailling. No one else but the Narcotic Agents ever investigated his files. Witness didn't know positively on October 15, 1940, that 'Anderson' was a narcotic agent, but thought he was such." (R. 51-52.)

(3) Extract from the testimony of WALTER MAYES, operator of a retail drug store at Union City, Tennessee:

"Witness had been in the drug business in Union City for a number of years, under the name of Mayes Drug Store; he was raised in Union City, and had known Dr. Nailling all his life, and knew Dr. Nailling had an extensive practice, but did not know the amount of practice, as the majority of his prescriptions went to another drug store. Dr. Nailling had a hospital. Witness had filled prescriptions in Union City for all the doctors; all the doctors issued narcotic prescriptions, and witness had filled prescriptions for five grains of morphine, after which the prescriptions were filed away and kept as long as two years, for the purpose of inspection." (R. 88-89.)

(4) Extract from the testimony of EDWIN McADOO, operator of a retail drug store at Troy, Obion County, Tennessee:

> "Witness had been in business in Troy a little over 40 years at that one place, and in the drug business all that time, having filled many hundreds of narcotic prescriptions. There was nothing unusual to excite your suspicion about these prescriptions he had been examined about. He had gotten similar prescriptions from other doctors under similar circumstances frequently, and it was not uncommon for other doctors to issue that type of prescription for that type of patient." (R. 94.)

DEFENDANT'S WITNESSES

(1) Extract from the testimony of LEON EVANS, proprietor of a drug store at Union City, Tennessee:

> "Witness testified that he was 66 years of age, had been a registered, licensed pharmacist since 1898, although not a graduate of any school; was the proprietor of Evans Drug Store, located in the building under Dr. Nailling's hospital; had been for six years and had been during all them he had been in Union City. Witness had filled thousands of prescriptions of various doctors, quite a number for Dr. Nailling, and from his experience as a druggist, it was not uncommon or unusual for him to fill prescriptions for twenty quarter-grains of morphine sulphate, issued by reputable doctors, and he had filled a number of these for doctors other than Dr. Nailling since he had been in Union City." (R. 213-214.)

(2) Extract from the testimony of P. J. GARRETT:

> "Next witness, P. J. GARRETT, being sworn, stated that he was 40 years old, a registered phar-

macist; had lived in Union City since 1926. Graduated from the University of Tennessee in Memphis, and registered in 1925. Had filled 18 to 20 prescriptions a day for the Evans Drug Store since 1935, and it was not uncommon to fill a prescription for morphine sulphate for twenty quarter-grains for all the doctors in Union City, and to deliver the narcotic to the person with the prescription."

Quotations from "Drug Addicts Are Human Beings."

"Doubtless similar comment ('We pay no attention to the Linder decision') had been made in many other Federal courts. For the matter of that, I have elsewhere recorded that an equivalent disavowal of the cogency of the Linder decision was once made to me, in person, in the presence of Assistant Attorney General Joseph Keenan, by a Mr. Fisher who was presented to me as the narcotics specialist of the Department of Justice." (P. 201.)

* * * * * *

"The 'experts' in question are, as a matter of course, employes of the Department of Justice. I chance to have had personal contact with one of these 'experts' in the office of the Attorney General of the United States. And I was by him assured, in the presence of Assistant Attorney General Joseph B. Keenan, that the Linder decision of the Supreme Court (which denied Federal control over the practice of medicine) had been rescinded by later decisions." (P. 208.)

(5)

No. 1042

IN THE

SUPREME COURT OF THE UNITED STATES

W. A. NAILLING,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

SECOND PETITION FOR REHEARING

TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT:

As petitioner conceives the law and the facts, there was not a tinge nor color of criminality in the issuance of the prescriptions for which he was convicted, and, further, than any construction and application of Section 2554 of the Internal Revenue Code that makes the issuance of such prescriptions a criminal act necessarily extends the operation of that statute into what has heretofore been regarded as forbidden territory.

So believing, and apprehending that an administrative practice, necessarily sanctioned in upholding, or ac-

quiescing in, the conviction in this case, which converts the Harrison Narcotic Law from a revenue measure into an act that primarily regulates the practice of medicine, may not have been sufficiently brought to the attention of this court as the result of a faulty presentation of that important question in the petition and briefs, petitioner in this second petition for a rehearing requests a further consideration of the point thus stated.

All counts on which petitioner was convicted involved prescriptions issued to one Dezonia. He was a confirmed addict. It is a matter of general medical knowledge that such an addict can consume ten grains of morphine in a period of twenty-four hours. Five grains was the maximum amount prescribed for Dezonia during such a period of time. Petitioner knew that Dezonia could use twice that amount during such a period, but limited his prescription to the "minimum" amount needed by Dezonia to relieve the intense pain he suffered (R. 161, 176). There was no reasonable probability that any part of the drug would be used by any other person, and none was so used (R. 109).

The prescriptions to Dezonia were not given indefinitely but for a limited period. Dezonia, advised of this limitation, promised to enter a narcotic institution when his temporary work at Union City was finished, and confirmed that promise by exhibiting to petitioner a letter, showing that arrangements had been made for Dezonia to enter a narcotic institution at Lexington, Kentucky (R. 162, 163). This treatment of Dezonia by petitioner, if the pain and suffering of that addict were to be so alleviated that he could finish his work, was merely preliminary to his later institutional treatment, and for pe-

titioner to have refused it under such circumstances would not only have been a betrayal of his professional obligation to relieve suffering and aid a patient to regain his normal condition but a shocking disregard of fundamental humanities (R. 239).

The prescriptions were filled by registered druggists, and all required records kept for inspection.

Having prescribed the minimum dosage required by Dezonia—this being shown by undisputed testimony—and having done nothing that directly or indirectly tended to defeat the revenue purposes of the Harrison Act or in any way embarrass or affect the collection of revenue, it logically and necessarily follows that petitioner's conviction can only be sustained by extending that act beyond the limits of a revenue measure.

But that is not all.

Many doctors, as shown by the record here (R. 134, 139, 238), refuse to prescribe narcotics for an addict, so refusing because they believe such a prescription would be a violation (R. 134) of federal law—a belief that flatly repudiates the construction thereof by this court.

But that is not all. In the introduction to a series of articles by Dr. Arthus La Roe, President of the American Narcotic Defense Association, published in September, 1941, by the American Weekly, having one of the largest circulations of any magazine in this country, it is stated that the Harrison Act *"makes it a crime for any doctor to give a dose of morphine to an addict."*

The extent to which that belief has been encouraged by administrative practices, is pointed out in the petition for a rehearing (pp. 5-7).

We do not conceive the quoted statement to be the law, but if the professional practice of physicians who entertain that view is the criterion by which the professional treatment of an addict by some other physician, is to be determined, as was the situation in this case, then any physician may be convicted because he refuses to accept such a construction of the law and regulate his practice accordingly.

Each count on which petitioner was convicted must be treated as a separate indictment (Dunn vs. U. S. 284, U. S. 390), and if a physician can be punished for prescribing the "minimum" requirement of an addict for a twenty-four hour period under the circumstances surrounding the issuance of the prescriptions to Dezonia, he can also be punished for giving him a single dose, and thus we have, as charged in the House of Representatives (see page 5 of the petition for a rehearing) an administrative practice that has "set at defiance the clear decisions of the Supreme Court."

Naturally, counsel for petitioner has been reluctant again to bring the issue herein presented to the attention of an overworked court, but believing that "finality *with justice reigning*" expresses the ultimate aim of a judicial inquiry, he has felt justified in so doing because of the great importance to physicians generally of the issue presented and also because he believes that petitioner has been punished for acts that were well within his legal rights as defined by the decisions of this court.

Keeping faith with the individual with whose rights they deal, is an imperative obligation of every agency of government, and never more so than now when the democratic ideal—which emphasizes the dignity of the individual—is engaged in a world-wide struggle for the mastery with the totalitarian concept of government under which the State is everything and the individual nothing.

The principles for which we thus contend is admirably stated by the district court in United States vs. Pardue, 294 Federal 543-548, from which we quote in conclusion:

> "This court is entirely sensible of the necessity for apprehending criminals, of the advantage of having criminals suffer for their offenses; but it is equally sensible that there is a higher obligation on government that that of catching one more or less offending criminal—the obligation of keeping faith with the individual * * * and when courts permit a construction of the law (the same principle should apply to application) which makes the government break faith with individuals, whether offenders or not, then the reason for courts has ceased, and justice is no more."

Wherefore, petitioner asks a reconsideration of the action of the court in denying the petition for certiorari and the first petition for a rehearing herein filed.

L. E. GWINN,
Attorney for Petitioner.

I, L. E. GWINN, attorney for petitioner, hereby certify that the foregoing petition is filed in good faith, and not for delay.

L. E. GWINN.